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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVENUE CORPORATION,
Petitioners,

against

PAUL A. PORTER, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS, AND BRIEF

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September 20, 1946

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above-entitled cause on August 23, 1946.

Opinions Below

The opinion of the United States Emergency Court of Appeals on rehearing (R., Opinion on rehearing) is unreported as yet. The opinion of said Court on the original hearing, filed June 25, 1945 (R., Opinion), is also unreported.

Statute Involved

The statute involved is the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, as it relates to control of rents for housing accommodations. The text of provisions of the Act which are most pertinent to the questions presented herein is quoted in the Appendix.

Jurisdiction

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered on August 23, 1946. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942 (56 Stat. 23).

Questions Presented

1. Does the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, in authorizing the Price Administrator to establish maximum rents which "will be generally fair and equitable" permit the Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment?

2. If the Emergency Price Control Act be interpreted as authorizing the Price Administrator to establish maximum rents which have such effect, does the Act, to that extent, violate the Fifth Amendment?

Statement

The Respondent, Price Administrator, issued the "Rent Regulation for Housing in the New York City Defense Rental Area", hereafter referred to as the "Rent Regulation", on October 8, 1943, to be effective November 1, 1943. The Rent Regulation established March 1, 1943, as the maximum rent date (R. Tr.* Part I, 1; Tr. Part II, 217). Petitioners are the owners of housing accommodations rented to tenants and located in New York City, and they are therefore subject to the provisions of the Rent Regulation (R. Tr. Part II, 217). On December 7, 1943, three** of Petitioners filed their joint protest against the Rent Regulation (R. Tr. Part I, 1-46). The joint protest was sponsored by the Metropolitan Fair Rent Committee, a

*"Tr." refers to printed Transcript of Proceedings Before the Price Administrator.

**The fourth petitioner, 1165 Park Avenue Corporation, owner of an apartment building in which average unit rents are over $100 per month, was added as an additional complainant by order of the Emergency Court of Appeals on February 1, 1946 (R., Court order of Feb. 1, 1946).

voluntary association of owners and agents of owners of housing accommodations in the New York City Defense-Rental Area (R. Tr. Part I, 2). The objections to the Rent Regulation which were made in the protest appear therein (R. Tr. Part I, 2-4), and were in substance that the Rent Regulation was not in accordance with law and was arbitrary and capricious, for the reason that the maximum rents established thereby, unless adjusted by percentage increase of 10%* of such maximum rents, are not generally fair and equitable within the meaning of the Emergency Price Control Act. On August 30, 1944, the Respondent, Price Administrator, issued an order, with accompanying opinion, denying the protest (R. Tr. Part II, 215, 224-261).

On September 29, 1944, the three Petitioners filed their complaint in the United States Emergency Court of Appeals under Section 204(a) of the Act. The answer of the Respondent, Price Administrator, was filed on October 17, 1944. On June 25, 1945, the Emergency Court of Appeals entered judgment setting aside the Rent Regulation in part, unless within thirty days the Administrator modified the Regulation as directed by that Court. The Court held that, on the face of the statistics for the industry as a whole, the Rent Regulation was invalid because it prevented landlords generally from realizing their pre-war net return. It held further, however, that, of the three major categories into which it divided the housing accommodations of the Area, only the so-called luxury type, with rents of $100 a month and up, had been adversely affected by reasons attributable to rent control. It accordingly concluded that the maximum rents need be increased only with respect to that class.**

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*Subsequently in the proceedings the percentage increase requested was raised to 15%.

**As to the other two categories, the Court held that, as to accommodations with average rentals below $30 a month, their depression was attributable to lack of demand rather than to control of rents; and that, as to the so-called competitive class, with average rentals between $30 and $99 per month, their net returns compared favorably with prewar returns.

By *ex parte* orders dated July 9, 1945, the Emergency Court of Appeals, on motions made by Respondent July 5 and 7, 1945, vacated that judgment, restored the case to the calendar for rehearing, and gave Respondent leave to introduce additional evidence directly to the court. Subsequently, Petitioners were likewise granted leave to introduce additional evidence; and both parties did so.

On November 30, 1945, the Price Administrator issued an order reopening the underlying protest proceedings in the case (Docket No. MRD-NY-7-P). Petitioners' motion to the Emergency Court to require the Administrator to withdraw such order was denied by it on January 11, 1946; and on March 20, 1946, Respondent issued a supplemental opinion reaffirming his order of August 30, 1944, denying the protest (R. Supp. Tr.,* Part II, 51-64).

On August 23, 1946, the Emergency Court of Appeals rendered its opinion on the rehearing and entered its judgment, now sought to be reviewed, dismissing the complaint (R., Opinion and Judgment on Rehearing).

This case has been treated by the Respondent, Price Administrator, as a test case on the application of the Rent Regulation to New York City. The New York City Defense-Rental Area consists of the five boroughs of New York City (Manhattan, Bronx, Brooklyn, Queens and Richmond) and the counties of Nassau and Suffolk (R. Tr., Part II, 1). Nassau and Suffolk counties are, however, of slight concern to the issues litigated. In 1940 the Area had a population of 8,059,098, of which 7,454,995 was in New York City, and 92% of the dwelling units in the Area were in New York City (R. Tr., Part II, 4, 60).

The evidence in the case, apart from general economic and real estate data, consists largely of a survey conducted by the Metropolitan Fair Rent Committee on behalf of Petitioners and a series of surveys conducted by Respondent. Respondent's surveys consisted of successive studies of

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*"Supp. Tr." refers to the printed Supplemental Transcript of Proceedings Before the Price Administrator.

operating income and expenditures of some 50,000 dwelling units in New York City for the calendar years 1939 through the consecutive periods of the surveys. Since there was little difference in the results reflected by such surveys, Petitioners have been content to accept Respondent's surveys as the basis of discussion throughout the proceedings.

From the beginning of the proceedings, Petitioners have taken the position that the Emergency Price Control Act requires that maximum rents, to be generally fair and equitable in a given defense-rental area, not only must permit industry-wide net operating income equal to that of the last prewar base year, but that they must also permit reasonable return on the industry-wide investment. At the original hearing the only evidence which Petitioners were able to submit on the question of industry-wide return on investment in New York City was that of return on assessed valuations. The Administrator did not take sharp issue with Petitioners on the proposition that maximum rents should permit a reasonable industry-wide return on industry-wide investment, but did contend that assessed valuation was not a proper basis for the ascertainment of return on investment.

The Court below held in its original opinion, dated June 25, 1945, that assessed valuations could not be treated as the equivalent of present fair value or original investment and stated:

> "* * * The complainants have thus failed to show either the original investment in or the present fair value of the rental properties subject to the regulation. Since the burden was upon them to do so we cannot hold that the regulation is not generally fair and equitable because it prevents the rental industry generally from realizing a fair return upon one or the other of those bases."

The Court thereupon determined the case at that juncture on the basis of comparing net operating income of the three segments into which it divided the industry for the year

ended June 30, 1944 (after eight months of rent control) with that of the base year 1939.*

On the rehearing Petitioners submitted substantial evidence on the question of fair return on investment. Petitioners obtained the actual book investment figures of *each* of the properties covered by the Administrator's latest survey renting for $100 or more and the actual book investment figures of a representative group of properties covered by the Administrator in such latest survey renting for less than $100. Petitioners also obtained similar figures of additional representative properties in the $100 and over group as a test check against the Administrator's survey. Actual book depreciation was obtained where available and where not available the cost of the *building* was depreciated at the rate of 3% for each year from date of acquisition to 1944 (R. Supp. Tr., Part I, 23-26). Petitioners also obtained the appraised valuations of all buildings refinanced or newly financed during the first half of 1945 and the sale prices of all buildings sold in the open market during the fiscal year, July 1944 to July 1945 (R. Supp. Tr., Part I, 27-30).

Applying ratios obtained from such representative samplings to the entire survey of the Administrator, the returns on original investment, on investment depreciated to 1944, on appraised value and on sales price were obtained (R. Supp. Tr., Part I, 26, 28, 30). This evidence indicated that the returns of the housing industry in New York City as a whole were grossly inadequate, and that apartment buildings in the category having average rents of $100 or more per month were operating at substantial deficits (R., Supp. Tr., Part I, 32, 35; Supp. Tr., Part II, 43-45, 49).

The return after depreciation and interest for the calendar year 1944 for the rental industry as a whole in New

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*The Administrator contended that the base period should be the average of 1939-1940, but the Court rejected this contention in both of its opinions.

York City, based on the Administrator's June, 1945, survey, was as follows (R. Supp. Tr., Part I, 31; Supp. Tr., Part II, 43):

% RETURN AFTER DEPRECIATION AND INTEREST

	On Assessed Value	On Original Investment	On 1944 Investment	On Appraised Value	On Sales Price
Total for New York City ..	.98%	.81%	1.05%	.97%	1.21%

If it be assumed that the properties bore mortgages equal to two-thirds of their value, so that the landlords' equity was one-third of the total value, the return to landlords as a whole on 1944 investment was 3 x 1.05% or 3.15%. Even on sales price, where the base would be low because the price would simply reflect what buyers are willing to pay in the poor apartment house real estate sales market prevailing in New York City, the return was only 3 x 1.21% or 3.63%.

On apartment buildings whose average rents were $100 per month or more, the return, after interest and depreciation, for the calendar year 1944, based on every building in such category actually surveyed by the Administrator, together with additional representative buildings surveyed by Petitioners, was a *deficit*, as follows (R. Supp. Tr., Part I, 34-35; Supp. Tr., Part II, 49):

% RETURN AFTER INTEREST AND DEPRECIATION

Rent Group	On Assessed Value	On Original Investment	On 1944 Investment	On Appraised Value	On Sales Price
$100 and over group for New York City.....	—2.80%	—2.31%	—3.09%	—2.75%	—2.82%

Here, again, since these returns are based on the entire value of the property and the landlord's equity can be assumed to be approximately one-third of the entire value, the loss percentage of the landlords in the $100 and over group would be three times the above-stated figures, or a deficit of over 9% per annum on 1944 investment.

Just prior to the last hearing in the Emergency Court of Appeals, Respondent offered in evidence a further survey of apartments in the $100 and over group through the

calendar year 1945. (April, 1946, survey of "luxury" apartments, R., Additional Evidence Filed April 30, 1946.) This survey showed almost no change in return on investment, the deficits for 1945 being substantially as great as those for 1944.

The Court below found that Petitioners' evidence on return on investment, "while not wholly satisfactory, tends to show original cost and present value of a representative group of properties". The Court stated that it had "accordingly given full consideration to this contention", i.e., the contention that the maximum rents as fixed by the Regulation must not prevent a reasonable return on investment.

However, the Court in its opinion on rehearing rejected this contention and concluded:

> "* * * It is true that we have stated that the statutory standard contemplates that maximum rents must provide landlords with profits reasonably calculated to sustain the industry. But we have indicated that the criterion to be used in making this determination is whether the net return* of the rental housing industry under the regulation is at the level enjoyed in the most recent period in which rents had not been influenced by defense activities. We think that this is all that the act requires * * * and that the Administrator * * * is not * * * under the duty to fix maximum rents at a level which would assure to landlords generally a [adequate] fixed rate of return on their investment."

As we shall show, in the brief attached to this petition, the year 1939 was itself a year of depressed net income

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*The phrase "net return", as used by the Court below in the sentence above quoted, evidently means net operating income before interest and depreciation. It is the rental income minus operating expenses, with no allowance for fixed charges, and is in no way related to return on investment. Thus the word "return" is not used by the Court below in the dictionary sense of "the rate of yield" and is therefore not to be confused with Petitioners' use of the word to express the rate of return on investment.

in the rental housing industry in New York City, a year in which that industry was unable to earn an adequate return on its investment; and conditions in New York City in that respect differed radically from those obtaining in the generality of cities in the country.

The returns which we have above summarized were the maximum indicated by any evidence in the record. They were based upon the figures in Respondent's own latest surveys, without adjustment or correction in ways that Petitioners contended they should be. Had Petitioners' contentions for their adjustment been accepted by the Court, the returns of the industry as a whole would have been far lower and the deficits of apartments in the $100 and over monthly rent range would have been even greater.*

The first of these contentions was that Respondent's surveys were not properly weighted. While the number of units surveyed (about 4% of the total) was adequate quantitatively, the sample contained too large a proportion of units in the middle or competitive category, renting from $30 to $100 per month, which had fared best during the war emergency, and too small a proportion of the over $100 and under $30 groups in which the operating results were comparatively unfavorable (see 1940 Census of Housing (R., Tr. Part II, 169-170; 164) for correct distribution of housing accommodations among the various rent ranges). 79.3% of the units in Respondent's November, 1944, survey were in the $30-$100 rent range as against only 66.6% according to the Census; the number of units in the under $30 group in the survey was 40.5% less than that indicated by the Census, and in the over $100 group nearly 18.4% less (R., Exhibit 5 of Affidavit, B. H. Woodward, January 29, 1945). The Court below held that, whatever might be the "theoretical advantage in achieving ideal statistical

*It should be noted that these contentions were not considered by the Court on the question of net return since the Court rejected the requirement of net return on investment as a matter of law. The Court's consideration of these contentions related only to the question of net operating income.

accuracy, * * * the weighting advocated by the complainants would not aid in determining the question for decision * * *".

Petitioner's other contention was that the figures of operating expenses in Respondent's surveys made no allowance for deferred maintenance. Respondents' June, 1945, survey showed that in 1944 the landlords spent for repairs and maintenance only 85% of what they had spent in 1939, despite the fact that prices of maintenance materials in New York City rose 25% and cost of labor 23.9% between 1939 and 1944, so that landlords were actually spending 35% less for these purposes than in 1939. They also showed that refrigerators, stoves and the like which were being replaced currently up to 1939 were not being replaced in 1944, with the result that, when these items again became available, landlords would face tremendous cumulative items of expense having no counterpart in the war years. The Court below agreed that there doubtless had been some deferment of essential maintenance work during the war period and to the extent that such deferment involved deterioration of the structure and thus imposed a cumulative burden on the landlord, allowance should be made for it; but held that Petitioners had not proved the extent of it.

Petitioners disagree seriously with the conclusions of the court below on these two points. In view, however, of the character of the reasons which this Court regards as sufficient for a favorable exercise of its discretion in the granting of certiorari, Petitioners do not seek review of those questions here.

Both of the points just adverted to are, in fact, relatively unimportant to the questions which we do here present. In the first place, on the Administrator's own unadjusted figures, the returns on the investment of the industry as a whole are grossly inadequate. Acceptance of Petitioners' contentions on weighting and deferred maintenance would have simply made the showing that much worse. For example, the return on 1944 investment, after fixed charges, would have been only .12%, and that on the landlords' equity on that basis only .36%. But the unadjusted figures

are quite bad enough to present the point. In the second place, the Court below decided the questions which we do here present as a matter of law. It would have made no difference to its decision whether the figures showed net returns on 1944 investment as 3%, zero, or a deficit, so long as the net operating income* of 1944 was commensurate with that of 1939.

This is not a case where the evidence has been weighed and a conclusion reached that a certain return is a fair return. The Court below refused to decide the question at all, on the ground that under the terms of the Act itself the question was irrelevant. The questions presented on this petition, therefore, raise no issue of fact; they are solely questions of law.

Specification of Errors to Be Urged

The Emergency Court of Appeals erred:

1. In interpreting the Emergency Price Control Act as authorizing the Price Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment.

2. In not holding that the Emergency Price Control Act as so interpreted is violative of the Fifth Amendment to the Constitution.

Reasons for Granting Writ

The Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

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*"Net operating income", the determinative used by the Court below, as explained *supra*, p. 8n, is not to be confused with net return on investment. The Court below did not even require that net return on investment be commensurate with that of 1939; it simply required that the dollar amount of the net operating income, that is, the differential between rental income and operating expense, in 1944 be commensurate with the dollar amount of such net operating income in 1939.

This case was the first in which even the Emergency Court of Appeals decided these questions. The Regional Rent Executive of the Office of Price Administration called the decision "the most far-reaching of all rent control rulings" (New York Herald Tribune, August 27, 1946). It is a test case, the final determination of which will govern the administration of the Emergency Price Control Act in any defense-rental area where neither the net return of landlords during rent control nor that realized by them in the pre-war period, was an adequate return on their investment.

Even as applied to the New York City defense-rental area itself, the decision produces consequences of the utmost gravity and importance. Out of a total of 14,476,005 rental dwelling units in the entire United States registered with the Office of Price Administration on June 30, 1944, there were 1,946,219 units registered in New York City alone as of April 30, 1944 (R., Court's original opinion). Respondent stated in his original brief in the Court below (p. 1) that this case "involves the maximum rents for approximately 15% of all rental housing subject to rent control in the United States." The total assessed value of residential real estate in the New York City defense-rental area exceeds $8,700,000,000 (R., Tr. Part I, 26).

The judgment of the Court below dooms this vast industry to operations yielding grossly inadequate return on investment over an indefinite period of time, thus impairing its ability to respond to post-war needs and destroying all incentive, and indeed ability, to produce the large volume of new housing accommodations which is so urgently needed by the community.

Conclusion

Because of the importance of the federal questions presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1946

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

References to the opinions of the Court below and the grounds of jurisdiction as well as a statement of the case and specification of errors to be urged are contained in the petition and will not here be repeated.

I.

THE EMERGENCY COURT OF APPEALS ERRED IN INTERPRETING THE EMERGENCY PRICE CONTROL ACT AS AUTHORIZING THE PRICE ADMINISTRATOR TO ESTABLISH MAXIMUM RENTS WHICH PREVENT THE RENTAL HOUSING INDUSTRY IN A DEFENSE-RENTAL AREA FROM RECEIVING A FAIR RETURN ON ITS INVESTMENT.

The opinion below says "that the Emergency Price Control Act does not *in terms** require that maximum rents shall be so fixed as to assure an adequate fixed return on the investment in rental housing accommodations". That is true. It is equally true that the Act does require that maximum rents be "generally fair and equitable", and that it nowhere specifies "in terms" that the sole determinative test of that requirement is that net operating income sometime after the imposition of rent control compares favorably with that of a base year prior to the onset of defense activities.

Section 2(b) of the Act requires not only that maximum rents be "generally fair and equitable", but also that they "will effectuate the purposes of this Act". The purposes of the Act, as set forth in Section 1(a) thereof, are, among others, "to prevent *speculative, unwarranted* and *abnormal* increases in prices and rents", "to eliminate and prevent *profiteering*" and "to prevent a post-emergency collapse of *values*". To this the Price Control Extension Act of 1946 (Public Law 548, 79th Congress, 2nd Session), in Section 1A, added the "purposes and policies in the transition period" which include "making possible

*All italics in quotations are ours.

a successful transition to a peacetime economy of maximum employment, production, and purchasing power under a system of free enterprise".

The purposes stated in the original Act were not only negative but positive. The negative ones were directed against "speculative", "unwarranted" and "abnormal" increases in rents, and against "profiteering". Certainly to stabilize maximum rents at a level no higher than needed to permit a fair return on investment value would be wholly consonant with those purposes. The positive purpose was directed at prevention of "a post-emergency collapse of values", which is wholly consistent with the purpose stated in the Extension Act for the transition period. To freeze rents indefinitely at a level wholly inadequate to enable the industry to maintain itself and provide resources sufficient to meet the demands of the post-emergency period, with its inevitable increases in costs of building and operation, is the last way to accomplish this objective. Such a course hastens, rather than retards, a collapse of real estate values.

This Court has held that the use by Congress of the phrase "just and reasonable" in a regulatory statute (which phrase, we submit, is equivalent in meaning to "fair and equitable" in the Act here in question) implies a requirement that the rate will permit a fair return, even where the statute, like this one, does not "in terms" so require. In *Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944), involving the federal Natural Gas Act (52 Stat. 821), this Court said (p. 603):

> "By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be *sufficient* to assure *confidence in the financial integrity* of the enterprise, so as to *maintain its credit* and to *attract capital.*"

It is true that the system of price and rent control established by the Act here in question was not to be per-

manent. But the legislative history of the Act makes it quite clear that Congress intended that the phrase "generally fair and equitable", which it used with respect to both prices and rents, also implied a fair return.

In preparing the price control bill Congress relied heavily upon the proposals of Leon Henderson, then Administrator of the Office of Price Administration and Civilian Supply, who subsequently became the first Price Administrator under the Act. Mr. Henderson as the first witness before the House Committee stressed the necessity of permitting industries to earn a return sufficient, in the words of Woodrow Wilson, to "sustain the industries concerned in a high state of efficiency, provide a living for those who conduct them, enable them to pay good wages, and make possible the expansion of their enterprises * * *" (House Committee on Banking and Currency, Hearings on H.R. 5479 (superseded by H.R. 5990), 77th Congress, 1st Session, (1941), page 11). This language was subsequently adopted by members of the Committee and was reiterated by Mr. Henderson (Hearings on H.R. 5479 (superseded by H.R. 5990), *supra,* pages 825, 103, 890). And it is apparent that the standards for fixing prices were also intended to apply to rents (House Report No. 1409, 77th Congress, 1st Session (1941) page 4). During the legislative hearings Congress discussed the problem of permitting a fair return to each individual landlord as opposed to the industry in general and concluded that to provide a fair return for each individual would be administratively impractical (Hearings on H.R. 5479 (superseded by H.R. 5990) *supra,* pp. 455, 962, 964). But clearly throughout the legislative hearings on the Act and also in the opinions of the Emergency Court of Appeals, prior to the instant case, it was taken for granted that the statutory standard requires that industry as a whole be permitted to earn a fair return on investment.

Until its decision in the instant case, the Emergency Court of Appeals had not only recognized this requirement, but in stating it had used language strikingly similar to the

test which Mr. Henderson, adopting the words of Woodrow Wilson, expressed to the committee of the House. In *Madison Park Corp.* v. *Bowles,* 140 F. (2d) 316, 323-324 (1943), that court said:

> "In the legislative history of the Act there is further guidance as to the meaning of the words 'generally fair and equitable'. From discussions of the legislation before its enactment, it appears the intention was to permit business a *yield or profit sufficient for its sustenance in a state of efficiency and for reasonable development and expansion.*"

The court reiterated that holding in *Equitable Trust Co.* v. *Bowles,* 143 F. (2d) 735, 742 (1944). In *Chatlos* v. *Brown,* 136 F. (2d) 490 (1943), the Emergency Court of Appeals found that net operating income in the Bridgeport, Connecticut, Defense-Rental Area had greatly increased under rent control and then said (p. 496):

> "* * * The record is bare of any showing that complainant and other landlords in the area are not earning under rent control a *fair return on their investments.*"

In *Madison Park Corp.* v. *Bowles, supra,* the Court did add by way of dictum that "the discussions [in the Congress] indicate it was believed these objectives *usually* will be attained by permitting profits which the industry was willing to accept prior to defense activities." But a *belief* that this will be true in the *usual* case cannot properly be regarded as any qualification of the basic Congressional intent to permit a "yield or profit" sufficient for the "sustenance" of the industry "in a state of efficiency" and for its "reasonable development and expansion". That applies equally in the unusual instance where the "yield or profit", or net return on investment, prior to defense activities was itself insufficient to meet these objectives. In such instances, maximum rents which did no more than duplicate the inadequate yield of pre-war years would be no more consonant with the basic intent of Congress than would maximum rents which reduced an adequate pre-war rent

level to the point where it did not permit a sufficient yield under that test. The record in this case shows that New York City does present the unusual situation above referred to.

In 1939 the rental housing industry in New York was still under the blight of a severe real estate depression which had begun several years before and which had persisted for several years thereafter.

On May 3, 1933, the Legislature of the State of New York declared the existence of a public emergency with relation to real estate, stating:

> "* * * rental values have declined so sharply that it is impossible in many cases for owners of real estate to meet their obligations on * * * bonds, mortgages, or other security. * * * Numerous defaults aggregating millions of dollars have occurred in the payment of interest and principal on such mortgage investments and on the bonds, mortgages and other security against which such mortgage investments have been issued; and widespread additional defaults are likely to occur therein" (Mortgage Moratorium Act, Laws of New York, 1933, Chapter 745).

On May 26, 1939, the Legislature of New York declared that the above emergency "still continues and that it may reasonably be expected to continue to and including the first day of January, nineteen hundred and forty-one" (Mortgage Moratorium Extension Act, New York Laws of 1939, Chapter 524).

The report of the Joint Legislative Committee on mortgage moratorium and deficiency judgments made to the New York Legislature on January 31, 1938 (New York Legislative Document (1938), No. 58, pp. 32-33) concluded "that the emergency period declared by the Legislature to exist still exists" and reported:

> "It is apparent that many owners of real estate are unable at the present time to meet the obligations of the mortgages on their property. Defaults are numerous and immediate liquidation of a substantial amount of these mortgages through foreclosure or other court proceedings would so demoral-

ize the general real estate market that there would be realized on such bonds and mortgages substantially less than the face amount thereof and substantially less than would be realized if they were disposed of in an orderly manner over a reasonable period of time.

"*Business conditions are much worse than a year ago.* The cost of living has gone up, employment has decreased, stock quotations disclose a tremendous shrinkage, *there is no active real estate market other than a buyers' market,* and there is no immediate sign of improvement. There has been a heavy increase in unemployment and the number upon the relief rolls. There can be no question but that the emergency exists and will continue to exist for a long time in the future. * * *"

Judicial notice may be taken of the fact that New York is the only state which still has a moratorium on mortgages. In March, 1944, the Home Owners' Loan Corporation stated that the losses on their properties in New York State were higher than anywhere in the country (R. Tr., Part I, 103-104). In 1939 real estate in Manhattan was selling at only 75.5% of its assessed value. That was a condition even more serious than that which obtained in the two preceding years. In 1937 the proportion of consideration in open market sales to assessed valuation was 82.9% and in 1938, 79.5% (R. Tr., Part I, 5, 34-35, 99-100). Under the law of New York, assessed value should represent "the price at which the property would sell under ordinary circumstances" (*People ex rel Parklin Operating Corp.* v. *Miller,* 287 N. Y. 126, 129).

The Superintendent of Insurance in his annual report to the Legislature, dated August 15, 1940, devoted a special section to the problem of insurance companies holding real estate among their assets. In the year 1939 life insurance companies admitted to do business in New York owned $438,252,976 of New York State real estate. (Compiled from the Annual Report of the Superintendent of Insurance, New York Insurance Report Vol. I, (1940)). The Superintendent of Insurance reported that "* * * In 1935

there was practically no net income [on such real estate]; in 1936 it was nine-tenths of 1 per cent; in 1937, 1.6 per cent, and in 1938, 1.5 per cent." (New York Insurance Report, Vol. I, *supra,* p. 43a)*.

The report of the Joint Legislative Committee on mortgage moratorium and deficiency judgments made to the Legislature under date of February 24, 1942 (New York Legislative Document (1942) No. 45), contained the following information with respect to real estate held by savings banks in New York on October 31, 1940 (p. 23):

> "During the year 1939, 3,843 parcels of real estate held by the savings banks of the State were classified as unproductive and resulted in a net loss of $2,418,000. All of the properties held by all of the savings banks in the year 1939 [book value $304,395,098] resulted in a net loss of $741,000."

In New York the condition of the real estate rental market worsened, rather than improved, with the coming of war in Europe and the onset of emergency defense preparations here. That is shown by the following tabulation (R. Supp. Tr., Part I, 242):

ACTUAL FIGURES** FROM JUNE 1945 SURVEY
(1939 = 100)

Item	1939	1940	1941	1942	1943	1944
Scheduled Income***..	100.0	99.8	99.1	98.7	98.4	98.2
Net Rental Income....	100.0	98.8	96.8	97.6	99.9	103.3
Operating Expenses ..	100.0	101.0	101.7	102.1	104.7	103.9
Net Operating Income	100.0	95.4	89.0	90.6	92.5	102.3

*We understand that the returns on real estate reported by the Superintendent of Insurance were based upon the net income *before* depreciation or interest as related to the value of the properties.

**After statistical weighting of these figures, the net operating income of 1944 was shown to have been 1.4% below that of 1939 (R. Supp. Tr., Part I, 261). After both weighting and adding to operating expenses a proper reserve for deferred maintenance, net operating income for 1944 was shown to be only 90.7% of that of 1939, a decrease of 9.3%.

***"Scheduled Income" shows the level of rents actually charged; that is, the rental income which the properties would have produced if fully occupied at the rents actually charged or scheduled for each apartment.

New York City is primarily a commercial and financial, rather than industrial, center. The effect of defense activities was not stimulative, but depressive. Its population from 1940 to 1943 declined rather than increased (R., Tr. Part II, 4). It had no influx of war workers. In fact, the War Manpower Commission consistently classified it as a labor surplus area (R. Tr., Part I, 31, Office of War Information Release PM 4644, August 1, 1944). Until considerably beyond the maximum rent date, March 1, 1943, there was no general housing shortage (R. Tr., Part I, 30). The chief effect of defense and war activities upon landlords in New York City was to increase their operating costs, without raising the level of rents.

Indeed, the level of rents actually charged by landlords in New York City (that is, the "scheduled income" as defined *supra*, p. 20n) was less at and after the maximum rent date than that which obtained even under the depressed conditions of 1939. The following tabulation, covering the 50,129 units in the Administrator's survey, (R. Tr., Supp. Part I, 241) graphically portrays this decrease:

Year	Scheduled Income
1939	$28,965,176
1940	28,900,635
1941	28,695,675
1942	28,592,671
1943	28,489,483
1944	28,449,560

The course of the real estate rental market in New York City, as above portrayed, was the opposite of that which obtained in other cities in the country for which statistics are available. As to them there is nothing to indicate that the returns during the pre-war years, and especially 1939, were not satisfactory. Moreover, in those cities the effect of defense and war activities was to stimulate the rental market; and, before the maximum rent dates which were fixed when rent control was imposed upon

them, the landlords' net operating income had risen to levels far higher than those of 1939. In Kansas City net operating income after one year of rent control was 210.1 with 1939 as the base year of 100. In Seattle it was 158.7; in San Diego, 167.4; in Detroit, 128.9; in Minneapolis, 116.4; in San Francisco, 111.8. In twenty-five cities used as a cross-section by the Administrator in hearings before the House Committee on Banking and Currency (H. R. 4376, U. S. House of Representatives, 78th Cong., 2d Sess., Vol. 1, Chart 23, p. 1282), it averaged 126.8. In thirty-six cities other than New York, all under rent control, subsequently studied by the Administrator, he reported that net operating income for apartment houses had increased from a base of 100 in 1939 to 136 in 1944 (Rental Housing Operation under Rent Control in Thirty-six Cities, 1939-1944, Office of Price Administration Financial and Statistical Analysis Branch, Rent Department, January, 1946). In New York, after eight months of rent control, it was only 95.48 even on an unadjusted basis, that is, without weighting and with no reserve for deferred maintenance. On such unadjusted basis (*supra*, p. 20), it was only 102.3 at the end of 1944, despite the attainment by that time of practically 100% occupancy.

The only authority relied on by the Court below for its conclusion that the sole requirement of the Act was that the net operating income of the industry be the equivalent of that realized before the war emergency, was its former decision in *Wilson* v. *Brown,* 137 F. (2d) 348 (1943). That case involved an entirely different question. That was whether every individual landlord must be assured a fair return on the fair market value of his particular housing accommodations. The complainants in that case (137 F. (2d) p. 350) made no claim that the established maximum rents in Chicago were not "*generally* fair and equitable". The apartment building which they owned had passed through an abnormal transition with the result that, while at the time rent control was imposed their rentals were normal and reasonable, they were abnormally depressed at

the earlier date which the Administrator selected as the maximum rent date, to the levels of which rentals were rolled back. Their complaint was that the adjustments of the maximum rents authorized by the Act were limited to factors "of general applicability", and that there was no provision for protecting individual landlords from losses due to such peculiar circumstances.

Wilson v. *Brown* presented no substantial question of interpretation. The language of the Act was plainly against the complainant's contention, and the reports of the committees of Congress, and the other items of legislative history cited by the Court, showed conscious intent on the part of Congress that the Act should not guarantee a profit to each individual landlord. As the Court said: "Necessarily, a nation-wide regulatory program of such vast proportions as contemplated would work hardship to some individuals affected. Congress was conscious of this inescapable by-product of war-time regulation" (*id.* pp. 350-351). The only substantial question was as to the power of Congress under the federal constitution. As to this the Emergency Court said (*id.* p. 352) that there had been no "taking" of the complainant's property in the constitutional sense, since the Act did not require the landlord to continue his property in the rental market, and the restriction on his use of it for such purposes was for a limited period. It said that "the only question remaining to the courts is whether Congress had any rational basis for its judgment that it would be administratively impracticable to operate a scheme of nation-wide rent regulation on the basis of assuring to each of many million landlords a fair return on the fair market value of his rented property"; and held (*id.* pp. 353-4) that the Administrator had made a sufficient showing that to provide such assurance would lead to such administrative complexities and burdens that national rent regulation would break down under their weight.

In the instant case the Court below said that these observations apply "with equal force" to the question of

interpretation here raised, that is, whether maximum rents may be deemed "generally fair and equitable" if they deprive the "landlords as a whole" of opportunity to receive a fair return on their investment. We submit that the Court's statement is a complete *non sequitur*. In the first place, no serious administrative burden would be involved in requiring maximum rents which would not prevent a fair return on an industry-wide basis. The return for a defense-rental area generally can be ascertained by statistical studies. The Administrator's settled practice has been to make periodic surveys of a 4% sample of the comparative net operating income of housing accommodations in the New York City Defense-Rental Area and in other defense-rental areas throughout the country. It would be a relatively simple matter for the Administrator in making such surveys to obtain, in addition to the operating figures, the investment and depreciation figures. Relating the total of net operating income less depreciation in such sample to the total of original investment less depreciation would readily indicate whether the industry as a whole is permitted to earn a fair return on investment.

Nor, on the question of interpretation, is there persuasiveness in the reasons which the Emergency Court in the *Wilson* case cited as indicating that no "taking" of property was contemplated by the Act. While it is true that the Emergency Price Control Act is denominated a temporary measure, nevertheless Congress undoubtedly contemplated that it would be in force for an indefinite time. The history of the District of Columbia Rent Law of 1919 and those of the New York rent law for World War I and New York's Mortgage Moratorium Act were ready examples. As a matter of fact, this Emergency Price Control Act has been in force now for four years, and has just been extended for a fifth. Nor should there be imputed to Congress the utterly unrealistic conception that landlords generally may avoid the consequences of the Regulation by taking their properties off the rental market. 92% of the dwelling units in the New York City Defense-Rental Area are in

New York City itself, and of the total number in the City 77.7% are tenant occupied (R. Tr. Part II, 60). Actually, by far the greatest number of rental accommodations affected by rent control in New York City are apartment house accommodations. Most of them carry substantial mortgages with heavy interest and amortization requirements. They are subject to heavy real estate taxes and insurance charges as well as expense of upkeep. No owner could withdraw such accommodations from the rental market without losing his property almost overnight. In a choice of evils, the lesser would be to continue his ownership, and operate at an annual loss made up from his own savings, even for a relatively long period. To withdraw apartment houses wholly from the rental market would be economic suicide.

It is submitted that Congress cannot properly be deemed to have intended that the entire rental housing industry in a great city should be doomed to an indefinite number of years of operating without reasonable profit. That would be no way "to prevent a post emergency collapse of values" (original Act, Sec. 1(a)); or to achieve "a successful transition to a peacetime economy * * * under a system of free enterprise" (1946 Extension Act, Sec. 1A(a) (1)). To relegate landlords as a whole to any such situation not only deprives an essential industry of the vitality required to meet post-war needs, but acts as a severe deterrent to the production of new rental housing accommodations the urgent necessity of which is universally recognized. It cannot be expected that new money will be invested in an industry wherein failure is well-nigh a certainty.

II.

THE EMERGENCY PRICE CONTROL ACT, AS INTERPRETED BY THE EMERGENCY COURT OF APPEALS, VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

On the constitutional question the court below satisfied itself by citing its former holding in *Wilson* v. *Brown*,

supra, that the Administrator was under no statutory "or constitutional" compulsion to provide that the maximum rents of "each individual landlord" afford him a fair return on the fair market value of his rental property, and by stating that the observations made in that case apply "with equal force" to the question raised by the failure of the Regulation to permit the "industry as a whole" to realize a fair return. The court below cited no other authority. The same failure to appreciate the vital difference between denial to an individual landlord of any right to charge rentals sufficient to yield a fair return, and the denial of such opportunity to the industry as a whole, characterizes the decision of the court below on the constitutional question as it did on the question of interpretation.

The fact that the questions involved in the two situations are not the same appears by clearly implied recognition in this Court's opinion in *Bowles* v. *Willingham,* 321 U. S. 503 (1944), decided some eight months after *Wilson* v. *Brown.* This Court (321 U. S. p. 517) cited and followed *Wilson* v. *Brown,* but, in its definition of the issue which was presented and decided, clearly indicated its disposition to limit its decision to the case before it. This Court described (*id.* pp. 516-17) the argument of Mrs. Willingham, the landlord, as being that Section 2(b) of the Act is unconstitutional *"because"* it requires maximum rents which are *"generally* fair and equitable"; "that a rental which is 'generally fair and equitable' may be most unfair and inequitable as applied to a particular landlord and that a statute which does not provide for a fair rental to each landlord is unconstitutional". This Court held (*id.* p. 518) that "it has never been thought that price-fixing, *otherwise valid,* was improper because it was on a class rather than an individual basis", citing as an example the fact that high-cost operators may be more seriously affected by price control than others. It said (*id.* p. 519): "We need not determine what constitutional limits there are to price-fixing legislation"; and concluded that in the stress of a great war effort, the nation is under no constitutional necessity of providing

a system of price control which will assure "each landlord" a fair return on his property.

This Court (*id.* p. 517) cited *Wilson* v. *Brown, supra,* for the statement that "It has been pointed out that any attempt to fix rents landlord by landlord as in the fashion of utility rates, would have been quite impossible"; and held that "such considerations of feasibility and practicality are certainly germane to the constitutional issue". As we have above pointed out, there is no impracticality in fixing maximum rents on a level which will not prevent landlords "generally" throughout the entire defense-rental area from receiving a fair return on their investment.

We submit that, with the justification of impracticality removed, a regulation which imposes maximum rents which will deprive an entire industry of all opportunity to realize a fair return on its investment is an arbitrary and capricious exercise of power, which offends the due process clause of the Fifth Amendment, even if it be assumed that no "taking" of property is accomplished.

It is clear, at least, that the constitutional question thus raised was consciously left open by this Court in *Bowles* v. *Willingham, supra.* It is thus, like the question of the interpretation of the Act, an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

CHARLES E. HUGHES, JR.
Counsel for Petitioners

CURTISS E. FRANK
BARBARA H. WOODWARD
Of Counsel

Dated: New York, N. Y.
September 20, 1946.

APPENDIX

Pertinent Provisions of the Emergency Price Control Act of 1942.

Section 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

Section 2 (b). Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particu-

lar defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. Whenever the Administrator shall find that, in any defense-rental area or any portion thereof specified by him, the availability of adequate rental housing accommodations and other relevant factors are such as to make rent control unnecessary for the purpose of eliminating speculative, unwarranted, and abnormal increases in rents and of preventing profiteering, and speculative and other disruptive practices resulting from abnormal market conditions caused by congestion, the controls imposed upon rents by authority of this Act in such defense-rental area or portion thereof shall be forthwith abolished; but whenever in the judgment of the Adminis-

trator it is necessary or proper, in order to effectuate the purposes of this Act, to reestablish the regulation of rents in any such defense-rental area or portion thereof, he may forthwith by regulation or order reestablish maximum rents for housing accommodations therein in accordance with the standards set forth in this Act. (As amended June 30, 1944).

Section 2 (c). Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order. (As amended June 30, 1944).

Section 204 (d). Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and

orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Price Control Extension Act of 1946 (Chapter 671, Public Law 548, 79th Congress, Second Session, July 25, 1946).

Section 3. Title I of the Emergency Price Control Act of 1942, as amended, is amended by inserting after section 1 thereof a new section as follows:

"PURPOSES AND POLICIES IN THE TRANSITION PERIOD

"Sec. 1A. (a) OBJECTIVES.—The Congress hereby affirms—

"(1) that because of abnormally excess spending power in relation to the presently available supply of commodities, rapid attainment of production equal to the public demand is one of the necessary and urgent objectives for the prevention of inflation and for the achievement of a reasonable stability in the general level of prices and rents, cost of living and costs of production (including labor costs), for the purposes set forth in section 1 of this Act and for the further purposes of protecting the real value of benefits provided by law for veterans and their dependents, of keeping faith with purchasers of United States War Bonds, and of making possible a successful transition to a peacetime economy of maximum employment, production, and purchasing power under a system of free enterprise; * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVENUE CORPORATION,

Petitioners,

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

CHARLES E. HUGHES, JR.,
Counsel for Petitioners.

CURTISS E. FRANK
BARBARA H. WOODWARD
Of Counsel

Dated: New York, January 2, 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVENUE CORPORATION,

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v.

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Respondent.

No. 526

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONERS

Petitioners do not find it necessary to make any extended reply to respondent's brief in opposition to the application for certiorari herein. So far as respondent's arguments are germane to the issues appropriate for consideration on this application, they have been sufficiently anticipated and met in the petition for certiorari and our supporting brief. To undertake to reply to respondent's several arguments based on selected extracts from the somewhat voluminous record herein, which would be appropriate to argument on the merits in the event that this Court grants the petition, would unreasonably extend our presentation on this application. We think that enough has

been shown in the petition and supporting brief to indicate that the decision of the Emergency Court of Appeals below is of sufficient importance to require review by this Court.

The purpose of this reply brief is chiefly to call attention to two serious inaccuracies of statement in respondent's brief in opposition.

The first is (Respondent's Brief, p. 11) that the Act "requires" the Administrator to fix maximum rents with reference to rents prevailing as of a particular date. All that the Act requires on this subject (Section 2(b)) is that in establishing any maximum rent the Administrator shall "ascertain" and "give due consideration" to the rents prevailing on the dates indicated. But the required ultimate standard of such maximum rents is that they "will be generally fair and equitable and will effectuate the purposes of this Act." And, as we have shown in the supporting brief (pp. 16-18) to the petition, the Emergency Court of Appeals had, until its decision in the instant case, interpreted that standard as requiring "a yield or profit sufficient for its [the industry's] sustenance in a state of efficiency and for reasonable development and expansion."

The other inaccuracy is in respondent's statements (Respondent's Brief, p. 9) that petitioners did not raise the constitutional question before the court below, and that (*id.* pp. 18-19), "* * the court below did not pass upon the constitutional question now sought to be raised by petitioners because petitioners never raised this question below." In our brief in the court below on rehearing, following our argument on the interpretation of the Act (pp. 57-59), we said (p. 59):

> "We submit that, if the Act were so construed as to authorize the Administrator to fix maximum

> rents at so low a level that the entire rental industry in a defense rental area would be prevented from realizing a fair return on its investment, its application as so construed would be contrary to the due process clause of the Fifth Amendment."

The opinion of the court below shows that it considered the question of constitutionality as well as that of interpretation (R. 1045-1046). The Court cited its former decision in *Wilson* v. *Brown* (137 F. (2d) 348 (1943)) as holding "* * that the Administrator was under no statutory *or constitutional** compulsion to provide that the maximum rents of each individual landlord afford him a fair return on the fair market value of his rental property"; and then held that "These observations apply with *equal force* when made as here in connection with the contention that the return from rental housing is not generally fair and equitable to landlords as a whole unless it affords them an adequate fixed rate of return on the investment of the industry as a whole". In the passages between the above-quoted sentences the court below remarked that, in *Wilson* v. *Brown* it pointed out that "* * principles derived from the law of eminent domain or public utility rate making are wholly inapposite", and that "* * under the act there is neither appropriation of the landlord's property nor compulsion upon him to continue his housing accommodations in the rental market", which obviously bore on the question of constitutionality more than on that of interpretation.

It is true that petitioners did not raise constitutional questions in their protest, filed December 7, 1943, sixty days after the issuance of the Rent Regulation, which originated the proceeding before the Price Administrator. But it is

*All italics in quotations in this brief are supplied.

plain that the extracts from the protest which respondent cites (Respondent's Brief, footnote p. 9) referred only to questions with respect to the constitutionality of the Act on its face and "the propriety of establishing rent control and regulation for said New York City Defense-Rental Area *at proper maximum rents.*"* The disclaimer referred to questions of constitutionality appearing on the face of the Act, such as that legislative power has been improperly delegated to the Administrator and that the Act offended the due process clause of the Fifth Amendment in not providing for a fair return to each particular landlord, which were considered by this Court in *Bowles* v. *Willingham,* 321 U. S. 503, discussed in our supporting brief (pp. 26-27). A question such as that here raised, growing out of the application and interpretation of the Act by the Administrator, could not have then been foreseen, and stands on a wholly different basis. Since that question was squarely raised (without any objection on the part of respondent) in the court below, and decided by it, it is open for review here.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
Counsel for Petitioners.

CURTISS E. FRANK
BARBARA H. WOODWARD
Of Counsel

Dated: New York, January 2, 1947

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*This phrase is in the passage from R. 2, which respondent quotes in part, as well as in that from R. 7.

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IN THE

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OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVE. CORPORATION,

Petitioners,

against

PAUL A. PORTER, PRICE ADMINISTRATOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

MOTION TO DISPENSE WITH PRINTING SPECIFIED PARTS OF CERTIFIED TRANSCRIPT OF RECORD AND AFFIDAVIT IN SUPPORT THEREOF

/ CHARLES E. HUGHES, JR.,
Counsel for Petitioners.

CURTISS E. FRANK
BARBARA H. WOODWARD
Of Counsel.

IN THE

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OCTOBER TERM, 1946

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVE. CORPORATION,

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PAUL A. PORTER, PRICE ADMINISTRATOR,

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No. 526

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

MOTION TO DISPENSE WITH PRINTING SPECIFIED PARTS OF CERTIFIED TRANSCRIPT OF RECORD

Upon the annexed affidavit of Charles E. HUGHES, Jr., sworn to October 23, 1946, petitioners above named respectfully move this Court for an order directing the Clerk of this Court to dispense with the printing, for the purposes of the presentation to this Court of the petition for certiorari herein, under Rule 38, subdivision 7 of the Rules of this Court, of the following material appearing on the following pages of the certified transcript of the record in this case, heretofore filed in the office of the Clerk of this Court pursuant to subdivision 1 of said Rule 38:

Item (1). Respondent's motion to introduce additional evidence, December 20, 1944 (*R. 861-863);

Item (2). Order on respondent's motion, January 5, 1945 (R. 864);

Item (3). Respondent's memorandum analyzing additional evidence, January 10, 1945 (R. 865-876);

Item (4). Respondent's additional evidence (November, 1944, survey), January 10, 1945 (R. 877-942);

Item (5). Appendix B to complainants' reply brief, January 30, 1945 (R. 943-958), analyzing respondent's additional evidence;

Item (6). Respondent's petition for rehearing and motion to introduce additional evidence, July 5, 1945 (R. 977-994);

Item (7). Respondent's motion to introduce additional evidence, July 7, 1945 (R. 995-996);

Item (8). Order granting respondent's motion to introduce additional evidence, July 9, 1945 (R. 998);

Item (9). Respondent's additional evidence (June, 1945, survey), July 9, 1945 (R. 999-1070);

Item (10). Respondent's additional evidence (June, 1945, survey), July 9, 1945 (R. 1071-1080);

Item (11). Order granting complainants an extension of time to introduce additional evidence, September 27, 1945 (R. 1081);

Item (12). Complainants' motion to introduce additional evidence, November 1, 1945 (R. 1082-1101);

Item (13). Respondent's answer to complainants' motion, November 9, 1945 (R. 1102);

Item (14). Order granting complainants' motion, November 9, 1945 (R. 1103);

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*"R" refers to the record as certified to this Court by the court below and the pages as numbered in such certification.

Item (15). Complainants' motion to add an additional complainant, January 30, 1946 (R. 1104-1107);

Item (16). Respondent's answer to complainants' motion, February 1, 1946 (R. 1108);

Item (17). Order substituting Paul A. Porter as respondent, March 25, 1946 (R. 1110);

Item (18). Respondent's motion to introduce additional evidence (April, 1946, survey), April 30, 1946 (R. 1111-1112);

Item (19). Stipulation relating to said additional evidence, April 30, 1946 (R. 1113-1114);

Item (20). Order granting respondent's motion, April 30, 1946 (R. 1115);

Item (21). Petition that Emergency Court of Appeals settle record for review on writ of certiorari in this Court, September 16, 1946 (R. 1151-1161); and

Item (22). Respondent's suggestion as to lack of jurisdiction of the court to entertain complainants' "Motion to Settle Record", September 17, 1946 (R. 1162-1164);

such order to be without prejudice, in the event that this Court grants said petition for writ of certiorari herein, to any motion which may be made by either party hereto with respect to the record to be printed for the use of this Court in that event; and for such other and further relief as this Court may deem just and proper.

October 23, 1946.

Respectfully submitted,

CHARLES E. HUGHES, JR.
Counsel for Petitioners
One Wall Street
New York 5, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., and 1165 PARK AVE. CORPORATION, *Petitioners,* *against* PAUL A. PORTER, PRICE ADMINISTRATOR, *Respondent.*	No. 526

AFFIDAVIT OF CHARLES E. HUGHES, JR., IN SUPPORT OF MOTION

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

CHARLES E. HUGHES, JR., being duly sworn, deposes and says:

I am an attorney duly admitted to be a member of the bar of this Court, with offices at One Wall Street, in the Borough of Manhattan, City and State of New York. I am counsel for the petitioners herein. I make this affidavit in support of a motion by petitioners to dispense with the printing of certain material which petitioners believe to be unnecessary to the consideration of their petition for certiorari herein.

The petition for a writ of certiorari to the United States Emergency Court of Appeals in the instant case was filed in this Court on September 21, 1946. Accompanying the petition for certiorari there was filed on the same day a certified transcript of the record in the case, including the proceedings in the Emergency Court of Appeals, which included all of the papers in the case, except a few items which respondent agreed with petitioners were unnecessary.

The certified transcript consists of four volumes of proceedings before the Price Administrator, which are in printed form, and of certain additional material presented directly to the Emergency Court, most of which is not in printed form. This motion relates only to that portion of the certified transcript which is presently unprinted and is concerned only with the printing required on presentation of the petition.

Because of the limited character of the questions which the petition presents for review in this Court, petitioners believe that only a comparatively small part of the rather extensive contents of this certified transcript is essential to the consideration of those questions. In the event that certiorari is granted, counsel for the parties hereto should carefully examine the entire record, printed and unprinted, in an endeavor to stipulate the omission of the large proportion of unessential material, as contemplated by subdivision 8 of Rule 38 of the Rules of this Court. From the present attitude of counsel for respondent (see *infra*, pp. 19-21), however, I anticipate that negotiations to that end would be protracted and that ultimately a motion would have to be made by petitioners to raise in this Court the question of proceeding on an abbreviated record.

If all this were done now, it would much delay this Court's action on the petition for certiorari. Moreover, this Court would not now be in as good a position to deal with such a comprehensive motion concerning the necessary contents of the record as it would be after it had become familiar with the issues in this case through its consideration of the petition. It is not necessary to make such a comprehensive motion at this time, because by far the greater part of the contents of the certified transcript is now in printed form, and I am informed that ten copies (but not forty copies) of this printed material are available to satisfy the requirements of subdivision 7 of Rule 38 relating to the presentation of the petition to this Court. The questions concerning the comparatively small part of the contents of the certified transcript which is unprinted are few and of relatively narrow compass. Only a brief explanation of the nature of the case and of the proceedings below is required to present them and to enable this Court to determine them. The larger questions as to what portion of the printed part of the certified transcript should be reprinted for the purposes of argument on the merits may be postponed until this Court has acted on the petition.

The case originated in a protest filed December 7, 1943, with the Price Administrator to the "Rent Regulation for Housing in the New York City Defense-Rental Area," issued by the Price Administrator under the Emergency Price Control Act of 1942 (56 Stat. 23) on October 8, 1943, to be effective November 1, 1943, and establishing March 1, 1943 as the maximum rent date. Summarily stated, the protest asked a percentage increase of 10%, later amended to 15%, of such maximum rents. The Price Administrator denied the protest on August 30, 1944, and

the protestants, on September 29, 1944, filed their complaint, under Section 204(a) of the Act, with the Emergency Court of Appeals which, upon the ensuing review, entered judgment on June 25, 1945 setting aside the Rent Regulation unless the Regulation were modified as directed by the court, in so far, but only in so far, as it applied to housing units bearing maximum rentals of $100 or more per month. On motion of the Price Administrator, the Emergency Court then vacated that judgment and granted a rehearing, and subsequently the Price Administrator reopened the underlying protest proceedings before him. On March 20, 1946 the Price Administrator again denied the protest, and the case was then re-argued in the Emergency Court of Appeals, which on August 23, 1946 entered judgment dismissing the complaint. The petition for certiorari seeks a review of that judgment.

The questions before this Court are presented in the petition for certiorari (p. 2) as follows:

> "1. Does the Emergency Price Control Act of 1942 (56 Stat. 23), as amended, in authorizing the Price Administrator to establish maximum rents which 'will be generally fair and equitable' permit the Administrator to establish maximum rents which prevent the rental housing industry in a defense-rental area from receiving a fair return on its investment?
>
> "2. If the Emergency Price Control Act be interpreted as authorizing the Price Administrator to establish maximum rents which have such effect, does the Act, to that extent, violate the Fifth Amendment?"

In the protest proceedings before the Price Administrator, and also before the Emergency Court of Appeals,

petitioners urged two distinct grounds of invalidity of the Rent Regulation: (1) that the maximum rents established thereby were insufficient to permit the rental housing industry in the Area an annual net operating income equal to that of 1939, the last pre-war year; and (2) that such maximum rents prevented the industry from receiving a fair return on the industry-wide investment. Both contentions were decided adversely to petitioners by the Price Administrator and by the court below. Because the decisions on the first question were based almost wholly on factual considerations, petitioners do not present that question for review in this Court. For somewhat similar reasons, they do not present (see petition, pp. 9-10) two subsidiary questions, relating respectively to whether the Administrator's statistical evidence was properly weighted, and whether the figures of operating expenses should include a reserve for property maintenance which had been deferred on account of war conditions. The second question above stated, however, which is presented in the petition for certiorari, was decided by the court below as a question of law (see petition, pp. 8, 10-11), and to its determination the major part of the record is believed to be unnecessary.

The certified transcript includes a series of surveys in tabular form covering operating statistics of large samples of apartment houses in New York City, which series, because two of the surveys are the most space-consuming items of the material involved in this motion, should be explained. During the period of over two and a half years in which this case was before the Price Administrator and the Emergency Court, five such surveys were presented, one by the protestants as the basis for their protest, and four

successively presented by the Price Administrator. The Administrator's first survey, called the "April 1944 survey", compared the operating experience of the years 1939, 1940, 1941, 1942 and 1943. It covered much the same matters as the protestants' original survey, and was based on a sample about double the size of protestants', so that protestants' survey was treated as superseded by the Administrator's. The Administrator's first denial of the protest in August 1944 was based upon it, and it appears in printed form in the record. That April 1944 survey was, however, superseded by the Administrator's second survey, called the "November 1944 survey", which added to the operating experience of the above years that of the first six months of 1944. It was submitted directly to the Emergency Court while the case was pending the first time before it, and is unprinted. It was the basis of the Emergency Court's first decision, which invalidated the Regulation as applied to housing accommodations renting for $100 a month and over; but, as above stated, that judgment was vacated, and it is not here in issue. The Administrator's motion for rehearing was based upon his third survey, called the "June 1945 survey", which carried the operating experience figures through the entire year 1944. It superseded the November 1944 survey, and was so treated by the Emergency Court, which in its decision on rehearing reached, on the basis of it, a different conclusion than that which it had reached in its first decision on the basis of the November 1944 survey. The June 1945 survey was submitted directly to the Emergency Court in unprinted form, but it was also before the Price Administrator when the protest proceeding was reopened, and the text or substance of all that petitioners regard as necessary for this Court's consideration of

the petition for certiorari, appears in the printed part of the record. The fourth of the Administrator's surveys, called the "April 1946 survey", also submitted directly to the Emergency Court, shows the operating experience of housing accommodations in the $100 and over per month rent range only. As to such properties it carries the figures through the entire year 1945, and supersedes the June 1945 survey as to that rental group; and it was so treated by the Emergency Court in its decision on rehearing. It is unprinted and, unlike the June 1945 survey, has no counterpart in the printed part of the record. Petitioners accordingly will have it printed for the use of this Court on the presentation of the petition.

The items in the certified transcript, with the printing of which the present motion seeks to dispense, fall into three major categories.

1. The items in the first category contain no evidence whatever bearing on the merits of the case, but comprise simply procedural matters, which petitioners believe to be wholly irrelevant now. These items, and further comments thereon, are as follows:

(a) (Items 1 and 2 in Motion). Papers and order on respondent's motion to the Emergency Court to introduce in evidence before it the Price Administrator's November 1944 survey (R. 861-864).

(b) (Items 6, 7 and 8 in Motion). Papers and order on respondent's motions to the Emergency Court for rehearing and to introduce in evidence before it the Price Administrator's June 1945 survey (R. 977-996, 998).

The motions were granted and the surveys introduced. The question of dispensing with the printing of the surveys themselves is treated under the second and third categories (*infra*, pp. 13-18). Petitioners raise no question as to the procedure whereby they came into evidence, and this procedural material is of no moment here.

(c) (Items 11, 12, 13 and 14 in Motion). Papers and order on petitioners' motion to the Emergency Court for leave to introduce additional evidence on the rehearing (R. 1081-1103).

The motion was granted, and the evidence proferred in the motion was introduced and appears in the printed part of the certified transcript (R. 507-603).

(d) (Items 15 and 16 in Motion). Papers on motion in the Emergency Court to add an additional complainant, petitioner 1165 Park Ave. Corporation (R. 1104-1108).

The motion was granted, and petitioners will have printed for the use of this Court the order granting same (R. 1109).

(e) (Item 17 in Motion). Order of the Emergency Court, March 25, 1946, substituting Paul A. Porter, as respondent, in place of Chester Bowles (R. 1110).

There is no dispute about this substitution.

(f) (Items 18, 19 and 20 in Motion). Papers and order on respondent's motion to the Emergency Court to introduce in evidence before it the Price Administrator's April 1946 survey (R. 1111-1115).

The motion was granted, the survey was introduced and, as above stated, petitioners will have it printed for the use

of this Court. Again, there is no question as to the procedure leading to its introduction.

> (g) (Items 21 and 22 in Motion). Petitioners' motion that Emergency Court of Appeals settle record for review on writ of certiorari in this Court, and respondent's suggestion as to lack of jurisdiction of the Emergency Court to entertain petitioners' "Motion to Settle Record" (R. 1151-1164).

This motion and suggestion are those described later in this affidavit (*infra,* p. 19). They are obviously unnecessary to this Court's consideration of the questions presented for review in the petition for certiorari.

2. The second category (Items 3, 4 and 5 in Motion) comprises the November 1944 survey (R. 877-942), a memorandum of respondent analyzing it (R. 865-876), and a counter-analysis contained in Appendix B to petitioners' reply brief on the first hearing in the Emergency Court (R. 943-958).

As above stated (*supra,* p. 10), this survey is now obsolete as appears from the opinion of the Emergency Court on rehearing. That opinion began as follows:

> "By order dated July 9, 1945 and upon petition of the Price Administrator this court vacated its judgment entered June 25, 1945 and granted a rehearing of the case. That judgment was based in large part upon the results of a November, 1944 survey of the operating experience of 1,642 structures containing 50,101 rental units in New York City for the calendar years 1939 through 1943 and for the six months period ended June 30, 1944. Upon rehearing a large amount of additional evi-

> dence was submitted by both the complainants and the Administrator. Included in the additional evidence submitted by the Administrator were the results of a survey dated June 20, 1945 covering substantially the same units as in the November, 1944 survey but including in addition their operating experience for the full calendar year 1944. The Administrator also submitted the results of a survey, dated April 22, 1946, of the operating experience of 4,630 units in 97 structures in New York City with an average monthly rental of $100 or more which included their operating experience for the full calendar year 1945. The results of these two surveys may be summarized in index number form as follows:"

The parties' respective analyses of the November 1944 survey are of course as obsolete as the survey itself.

3. The third and final category (Items 9 and 10 in Motion) comprises the June 1945 survey (R. 999-1080). While this is the latest survey, except for the properties in the $100 and over monthly rent range, petitioners believe that its printing now may properly be dispensed with by reason, among other things, of the extent to which the text or substance of its contents is reproduced in the printed part of the certified transcript.

Both this and the Administrator's surveys which preceded it bear primarily on the first question (*supra*, p. 9), namely that of comparative net operating income, which is not presented for review in this Court. The evidence which was introduced directly on the second question which is presented here, that of fair return on investment, is contained in other statistical matter which either is in the printed part of the certified record or included in the ma-

terial which petitioners will have printed for the use of this Court on the presentation of the petition. While some of the statistics in the June 1945 survey do have some bearing on that second question, petitioners do not believe that any thereof which are not already in print need be referred to either by counsel in their presentation, or this Court in its determination, of that question.

The chief differences between the June 1945 survey and the material that is already in print in the certified transcript are as follows:

The bulk of the survey is an "Operating Cost Study Apartments New York, N. Y.", dated June 20, 1945, prepared by the Accounting Department of the O. P. A. for the Director of the Program Division of the Rent Department. After a five-page letter of transmittal, that study contains forty-three exhibits, the first forty-one of which embrace detailed statistics of apartment operating data. Exhibit 1 gives this data for New York City as a whole and includes all rent ranges. Exhibits 2 to 41, inclusive, break down this comprehensive consolidated table into the figures for seven different rent ranges in the City, and the figures for the five boroughs of Manhattan, Brooklyn, Bronx, Queens and Richmond, first for all rent ranges, and then further broken down in each borough for the same seven rent ranges. The first comprehensive exhibit (Exhibit 1) is reproduced substantially in identical form in the printed part of the certified transcript as O. P. A. Exhibit 901 (R. 747), except that a comparison of the data for the six months ended respectively June 30, 1943 and June 30, 1944, which is believed to be now irrelevant, is omitted. In place of Exhibits 2 to 41, inclusive, of the study, which give the break-down by rent ranges and boroughs, the printed

part of the certified transcript includes O. P. A. Exhibits 904-930 (R. 749-762), which also give a break-down The main differences between the two sets of exhibits ar that in the printed exhibits: the comparison of operatig results for the several years is shown by index numbers rather than in dollar figures; the tables for the sever boroughs are not broken down into as many rent ranges s are those in the survey; and the component items of expe e are not detailed. As to the substitution of index numbe s for dollar figures in these subsidiary exhibits, the breakdown figures by rent ranges were, I believe, not referred to n the briefs or argument before the Emergency Court, xcept with respect to the $100 and over monthly rent rang and as to those rent ranges the June 1945 survey has been uperseded by the April 1946 survey; and the break-down boroughs has, I believe, never been referred to by the pa ies in the proceedings in the Emergency Court. The detail of the items of expense are believed to be significant only n the first question argued below (see *supra,* p. 9), wch is not before this Court, and to have no bearing on th issue of fair return on investment. Since the compreInsive figures for the entire City, in dollar amounts, and th all details of expense, appear in printed O. P. A. Exhit 901, petitioners believe that this gives all the informatn required for this Court's action on the petition.

Exhibit 42 in the Operating Cost Study, as we as a separate study included in the survey entitled "Apartment Occupancy December 1944, New York, N. Y.", date June 25, 1945, deals with statistics of trends of occupancy. In place of this material there appears in the printed rt of the record O. P. A. Exhibits 939 and 940 (R. 76-768) which show the occupancy trends by graphs. In thcourt

below, the occupancy statistics were, I believe, not used by either party on the issue of fair return on investment, but only on that of trends of net operating income. Petitioners believe that, if the occupancy statistics have any relevance to the questions before this Court, they are shown as satisfactorily by the graphs as by the figures.

The final exhibit, Exhibit 43, of the Operating Cost Study, is an analysis of December 1944 rents. The only use made below by either party of this exhibit, or of the corresponding exhibits in the preceding surveys, was, I believe, on the controversy with respect to the statistical weighting of the surveys, which petitioners have expressly excluded from the questions presented to this Court.

With respect to apartment properties with average monthly rent of $100 and over, the survey included a separate analysis of operating experience dated June 25, 1945, which has no counterpart in the printed part of the record. This section of the survey, however, like all of the figures in the Operating Cost Study for the $100 and over rent range, was superseded by the April 1946 survey, which dealt more comprehensively with that rent group and carried the figures one year further than the June 1945 survey. That the Emergency Court regarded the April 1946 survey as superseding, for the $100 and over rent range, all that had preceded it, is indicated by the passage from the court's opinion quoted above (*supra*, pp. 13-14).

The June 1945 survey also includes a memorandum, and a supporting letter from the Bureau of Census of the Department of Commerce, estimating the number of apartment house rental units in New York City falling in the $100 and over monthly rental range group. This estimate is based on O. P. A. Exhibit 577, which is in the printed part of the certified record (R. 311), and it is believed that this

exhibit is sufficient for the consideration of the questions presented to this Court.

The final document in the June 1945 survey is a study, entitled "Operating Experience of Apartment Properties Surveyed in New York City on which Depreciation and Interest Charges are Available", dated June 30, 1945. This, after a two-page memorandum of transmittal, contains seven exhibits, the first six of which show condensed summaries of income and expense, respectively, for New York City as a whole and for the boroughs of Manhattan, Brooklyn, Bronx, Queens and Richmond, and the seventh of which is an analysis of the December 1944 rents on the properties included in this report. The first exhibit, dealing with New York City as a whole, appears in substantially identical form (there is less detail of expense figures and the comparison between the six months ended respectively June 30, 1943 and June 30, 1944 is omitted) in O. P. A. Exhibit 931 which appears in the printed part of the certified record (R. 763). Also already printed are O. P. A. Exhibits 933-936 (R. 764-766) which give a more summary break-down by boroughs, in index numbers rather than in dollar figures, except that the Borough of Richmond (much the least populous of the boroughs, in which only ten properties were surveyed) is omitted. The break-down by boroughs was, I believe, not referred to by either side in the court below. The same, I believe, is true of the seventh exhibit, which has no counterpart in the printed part of the certified record. The figures which may be significant in this study are those of depreciation and interest for the properties surveyed for the City as a whole and these appear in printed O. P. A. Exhibit 931.

The November 1944 and the June 1945 surveys, and respondent's analysis of the former, alone comprise 30 pages of ordinary typewritten matter and 118 pages of tabular statistical matter. This tabular statistical matter is, comparatively speaking, very expensive to print, and petitioners believe that this substantial cost of printing would be a needless expense to petitioners, and also that these surveys and the other material which is the subject of this motion would needlessly encumber the record for the purposes of this Court's determination of the application for certiorari. If, contrary to petitioners' expectation, any member of this Court should desire to consult any portions of the June 1945 survey which are not included in the printed part of the certified transcript, or the November 1944 survey, they are available for that purpose in the certified transcript itself in the Clerk's office.

Counsel for petitioners have made repeated efforts to agree with counsel for respondent to dispense with the printing of the matter (except Items 21 and 22) which is the subject of this motion, or to obtain a determination of the necessity therefor otherwise than through a motion to this Court. Prior to the filing of the petition for certiorari herein, petitioners, after unsuccessful efforts to reach an agreement with the Office of Price Administration, filed with the Emergency Court of Appeals, on September 16, 1946, a motion (Item 21, R. 1151-1161) requesting that the record for review be settled by that court, eliminating as unnecessary the matter which is the subject of this motion, except Items 21 and 22. Respondent on September 17, 1946 filed a "Suggestion as to Jurisdiction of Court to Entertain Complainants' 'Motion to Settle Record'," which took the position that the Emergency Court did not have such jurisdiction (Item 22, R. 1162-1164). Said motion

had not been determined upon the date, September 21, 1946, when the petition for certiorari had to be filed, and accordingly, as above stated, there was filed with the Clerk of this Court on that date a certified transcript of the full record in the court below, except such items (not involved in this motion) as the parties had theretofore agreed to eliminate. On September 26, 1946 the Emergency Court of Appeals entered an order denying, without opinion, petitioners' said motion. That order recited respondent's suggestion as to that court's lack of jurisdiction to entertain the motion, and it is submitted that it may accordingly be fairly inferred that such jurisdictional question at least largely influenced such denial.

Thereafter, counsel for petitioners communicated with the General Counsel of the Office of Price Administration in an effort to arrive at an agreement with him and the Solicitor General of the United States to eliminate the matter above described. Counsel for petitioners proposed a stipulation, copies of which were sent to the General Counsel and the Solicitor General, to the effect that the proposed agreement cover only the printing of the ten copies of the record required on presentation of the petition for certiorari and that, if the petition were granted, the stipulation would be without prejudice to a motion by either party with respect to the forty copies required to be printed for argument on the merits. The proposed stipulation read as follows:

> "IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties hereto as follows:
>
> "1. That, the full record before the Emergency Court of Appeals having been certified to this Court, ten additional copies of the following matter need not be printed under Rule 38, subdivision (7) and

furnished for the use of this Court on consideration of the petition for a writ of certiorari herein:

[Here followed an enumeration of the matter which is the subject of this motion, except Items 21 and 22.]

"2. That, in the event that the petition for certiorari herein is granted, this stipulation will be of no further force or effect and will in no way control the printing of forty copies of the record pursuant to Rule 38, subdivision (7) of the Rules of this Court, or the matter to be included therein, and this stipulation will in that event be without prejudice to the making of any motion in this Court by any party hereto either to dispense with printing certain parts of the record or to print an abbreviated record."

By letter dated October 11, 1946, the General Counsel of the Office of Price Administration rejected the proposed stipulation on the ground that, in his opinion, the matter in issue is material to a consideration of the petition for certiorari. The Solicitor General has not responded.

No previous application for the relief requested in the foregoing motion has been made to this Court, or except as above stated.

CHARLES E. HUGHES, JR.

Sworn to before me this
23rd day of October, 1946.

HELEN B. GILMORE

HELEN B. GILMORE
Notary Public in the State of New York
Residence when appointed: Bronx Co.
Bronx Co. Clk's No. 194 Reg. No. 251-G-8
Certificates filed in
N. Y. Co. Clk's No. 962 Reg. No. 640-G-8
Kings Co. Clk's No. 222 Reg. No. 472-G-8
Queens Co. Clk's No. 626 Reg. No. 228-G-8
Commission Expires March 30, 1948

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 526

315 WEST 97TH STREET REALTY CO., INC., ODEM CORPORATION, MAPLE-81ST STREET, INC., AND 1165 PARK AVENUE CORPORATION, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 1040–1046) is reported in 156 F. 2d 982.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 23, 1946 (R. 1047). The petition for a writ of certiorari was filed in this Court on September 21, 1946. The jurisdiction of this Court is invoked under

Section 204 (d) of the Emergency Price Control Act, as amended (50 U. S. C. App., Supp. V, 924 (d); hereinafter termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Does Section 2 (b) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Supp. V, 902 (b)), require that the Rent Regulation for Housing, establishing maximum rents for apartment houses in the New York City Defense-Rental Area, must, to be generally fair and equitable, permit landlords of such housing accommodations to earn in general the fixed or definite rate of return on their investment traditionally afforded to public utilities?

2. Is Section 2 (b) of the Act, if not so construed, in violation of the Fifth Amendment to the Constitution?

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act, as amended, appear in the Appendix, *infra*, pp. 24–37. The Rent Regulation for Housing in the New York City Defense-Rental Area appears in the Federal Register (8 F. R. 13914).

STATEMENT

The Rent Regulation for Housing in the New York City Defense-Rental Area establishes as the maximum rents for housing accommodations in

the Area the rents in effect on March 1, 1943 (Section 4 (a), *infra* p. 29).[1]

Petitioners, the owners of apartment houses rented in New York City, filed a protest with the Price Administrator attacking the validity of the maximum rents established by the Rent Regulation (R. 1–10).[2] The protest was sponsored by the New York City Metropolitan Fair Rent Committee, a voluntary association consisting of landlords or owners of housing accommodations in

[1] For accommodations not rented until after March 1, 1943, the landlord is permitted to charge any rent he desires, subject to the authority of the Administrator to decrease such maximum rent to the level of the rent for comparable housing accommodations which prevailed on March 1, 1943 (Sections 4 (c), 4 (d) and 4 (e), *infra*, pp. 29–31).

The maximum rents established by the Regulation may be increased upon petition to, and order by, the Office of Price Administration in various situations where the particular housing accommodations have been altered substantially since March 1, 1943, or where the rent on that date did not represent the product of arms length bargaining between landlord and tenant (Sections 5 (a) (1)–5 (a) (11), inclusive, and Section 5 (a) (13), *infra*, pp. 31–37). In addition provision is also made for increasing maximum rents for individual landlords who are in a position of financial hardship under rent control by reason of increases in operating costs. (Section 5 (a) (12) of the Regulation and Section 2 (c) of the Act, *infra*, p. 35 and pp. 26–27).

[2] The Regulation became effective November 1, 1943, and the protest was filed approximately one month thereafter (R. 1). Various matters raised in the protest were brought for review by petitioner 1165 Park Ave. Corporation to the Emergency Court, and that petitioner's complaint was dismissed, *1165 Park Ave. Corp.* v. *Bowles*, 150 F. 2d 117. This decision is not involved here, petitioner 1165 Park Ave. Corporation having been permitted in 1946 to join with the other petitioners in this proceeding (R. 829, note 1).

New York City (R. 2). In the protest, the petitioners objected to the Regulation primarily on the ground that the maximum rents established for housing accommodations generally in the New York City Area were not generally fair and equitable and were not effectuating the purposes of the Act, as required by Section 2 (b) thereof, (*infra*, pp. 25–26), and insisted that the Administrator should be ordered to increase such maximum rents by amounts equal to 10% of the March 1, 1943 maximum rents (R. 3).[3] In support of their protest, the petitioners introduced evidence to show that the "average operating profit" under rent control of landlords generally in New York City had deteriorated because of generally increased operating costs to the point where such profit would not compare favorably with the average operating profit of landlords during the year 1940—which petitioners advanced as a proper base period for comparison (R. 3, 8, 476).

Voluminous evidence was introduced by the Administrator in the course of the protest proceedings showing the earnings position of the New York City apartment house industry currently and since 1939.[4]

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[3] The petition points out (Pet. 3) that long after the complaint was filed in the court below (R. 843), petitioners substituted a request for a 15% general increase in maximum rents for all accommodations in New York City.

[4] In accordance with consistent administrative practice, the Accounting Department of the Office of Price Administration has surveyed the financial position of landlords gener-

After the proceedings summarized in the note below[5] the Emergency Court of Appeals in a

ally in the New York City Defense-Rental Area since 1939. These surveys cover every six months of operation under rent control. There are three such surveys in the record, the most recent survey covering each of the years from 1939 through Dec. 31, 1944, inclusive (R. 121–171, 175–198; 747–767, 977–998), although the printing of one entire survey and portions of the latest survey was dispensed with by stipulation of the parties (R. 1049–1050). The Office of Price Administration has recently completed and published its survey for the calendar year 1945. See *Rental Housing Operation Under Rent Control, New York City* (October 1946), Financial and Statistical Analysis Branch of the Rent Department, OPA. This latter survey was not completed until after the decision in the court below. The data in the surveys are obtained directly from the books of landlords (R. 121–124; 978–984). Accepted statistical techniques of sampling are used. Petitioners do not question the results shown by these surveys (Pet. 5, 10).

[5] The protest was originally denied on August 30, 1944, on the ground that the data then available to the Administrator showed that the financial position of landlords in the New York City Area was more favorable under rent control than during the years 1939–1940 and that therefore the Rent Regulation was generally fair and equitable. (R. 457, 458–503). The Administrator also rejected the contention of petitioners, which was not raised in the protest but set forth for the first time during the course of the protest proceedings, that the Act required maximum rents to afford landlords a fair return on their investment in order to be generally fair and equitable (R. 496–498). Complaint was filed with the Emergency Court on September 29, 1944 (R. 843–854). The court entered its judgment on June 25, 1945, setting aside the Regulation insofar as it applied to housing accommodations the maximum rents for which were $100 or more (R. 960–975). The court held that: "the year 1939 was the last normal prewar year in New York City and was, therefore, the appropriate period for use in testing the validity of the regulation here in question" (R. 963). The court found, on the

unanimous opinion finally dismissed the complaint (R. 1040–1046, 1047). The court held that, to be generally fair and equitable under Section 2 (b) of the Act, a Rent Regulation must not prevent landlords generally from earning a net operating income under rent control at least equal to the net operating income which they earned during a representative peacetime period, and that such a period in the New York City Defense-Rental Area was 1939.[6] The court specifically rejected peti-

basis of the evidence then in the record, that although the Rent Regulation was not preventing owners of housing accommodations whose maximum rents were less than $100 from attaining a financial position as favorable as that which they enjoyed in 1939, it was operating to that effect with regard to owners of housing accommodations whose maximum rents were $100 or more and so set aside the Regulation in part. One judge dissented on the ground that the Regulation was valid in its entirety (R. 974–975). The court found that petitioners' argument that landlords generally were not earning a fair return on their investment was unsupported by fact. Upon motion of the Administrator, and submission by him of his most current survey of the financial position of the landlords, which tended to show that the Regulation was not preventing landlords of housing accommodations whose maximum rents were $100 or more from attaining a financial position as favorable as that which they enjoyed during 1939, the court vacated its judgment, remanded the case to the Administrator for the taking of further evidence and restored the case to the calendar for rehearing (R. 977, 977–998). Further evidence was taken (R. 505–828) and, after issuing a supplemental opinion reaffirming his denial of the protest on the basis of all the evidence in the record as supplemented, the Administrator filed the supplemental transcript with the court (R. 829–842). The case was then reargued (R. 1038).

[6] Taking the year 1939 as the base period is more favorable to petitioners than the year 1940 or the years 1939–1940

tioners' contention that the Act required that a Rent Regulation, to be generally fair and equitable, must assure landlords generally a fair return on their investment, in accordance with traditional public utility concepts of fair return and fair value of the investment. The court then found that the Rent Regulation did not prevent landlords generally, including those who owned properties containing housing accommodations whose maximum rents averaged $100 or more, from earning a net operating income as favorable as the net operating income they earned during 1939.[7] In fact, the record

because the financial position of landlords was better in 1939 than in 1940 (R. 747, 748).

[7] The term "net operating income", as used by the Administrator and the court below, denotes actual rental income from the properties, after deductions for *all* expenses (including expenses for repairs, maintenance, insurance and taxes and administrative expenses), but not for fixed charges (depreciation and interest). The term "net income" denotes actual rental income after deductions for all expenses and for fixed charges. Although the Office of Price Administration obtained some figures on the net income of landlords in New York City, "net operating income" is used as the standard because (1) a great many landlords do not show charges for depreciation and interest on their books, and (2) if the current net operating income of landlords is as favorable as it was during the base period, it is obvious that their current net income will be, comparatively, even more favorable, in view of the fact that depreciation charges have been stable since 1939 while interest rates have fallen (See Statement of Deputy Administrator for Rent, *I Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376, p. 109). The Tables set forth in the text, *supra*, p. 8, clearly illustrate this point.

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shows (R. 747, 748, 985–998) that not only was the net operating income of landlords greater in 1944 than it was in 1939 but their net income in 1944 was more than twice their net income in 1939.[6] The following tables show the comparative position of the landlords (R. 747, 748, 763, 764):

Comparative Position of 50,129[1] Rental Units for Which Net Operating Income Was Reported

	Net operating income	
	Index	Dollars
1939	100	$10,498,447
1944	102.3	10,738,438

Comparative Position of 31,540[1] Rental Units for Which Both Net Operating Income and Net Income Was Reported

	Net operating income		Net income	
	Dollars	Index	Dollars	Index
1939	$7,029,343	100	$947,884	100
1944	7,417,727	105.5	1,987,413	209.7

[1] These 31,540 Rental Units are included among the 50,129 Rental Units referred to in the first table.

[6] The results of the survey for the year 1945 show that the financial position of the landlords in 1945 was even better than it was in 1944. See note 5, *supra*. It should be noted, too, that these results understate the improvement of the financial position of the landlords under rent control because they are weighted downward by the deteriorating financial position of landlords owning housing accommodations whose maximum rents are less than $30 (R. 749, 985). The deterioration of the position of these landlords is due not to the impact of the Rent Regulation but to the fact that in a period of full employment and high earnings people do not choose to live in such accommodations, with the result that these landlords have suffered increasing vacancies (R. 495, 768, 969).

The court did not pass upon the question whether the Act, construed so as not to require that landlords generally be permitted a fair return on the fair value of their investment, was constitutional. Petitioners did not raise this question either in the course of the protest proceeding or before the court below. In fact, in their protest, petitioners specifically stated that they were not raising any question of constitutionality.[9]

ARGUMENT

Petitioners argue that a writ of certiorari should be granted in this case because their contention that Section 2 (b) of the Act requires that landlords generally, in the various areas under rent control, be permitted to earn the fair return on investment traditionally afforded public utilities raises an important, unsettled question as to the interpretation of that section of the Act (Pet. 22–24), and that an important consti-

[9] R. 7: "The protestants do not choose to raise any question with respect to the constitutionality of the Emergency Price Control Act of 1942 or with respect to the propriety of establishing, at proper maximum rents, rent control and regulation for said Defense-Rental Area, but they regard an increase of the maximum rents prescribed in the Rent Regulation as justified and necessary"; and R. 2: "The following is a statement of the objections herein raised by the protestants against the provisions of the Rent Regulation; and protestants state expressly that none of said objections is intended to raise any question with respect to the constitutionality of the Emergency Price Control Act of 1942 * * *".

tutional question is presented by the decision below (Pet. 25–27). It is submitted, however, that certiorari should not be granted in this case because (1) the Emergency Court of Appeals was so clearly correct in its construction of Section 2 (b) that review of its decision is not warranted; and (2) in fact, no question as to the constitutionality of the Act as so construed is properly raised.

I. THERE IS NO QUESTION THAT AS A MATTER OF STATUTORY CONSTRUCTION THE ACT DOES NOT REQUIRE THAT MAXIMUM RENTS MUST, TO BE GENERALLY FAIR AND EQUITABLE, PERMIT LANDLORDS GENERALLY TO EARN A FIXED RATE OF RETURN UPON THEIR INVESTMENT

A. THE LANGUAGE OF THE ACT MAKES IT CLEAR THAT THE RENTAL HOUSING INDUSTRY IS NOT TO BE TREATED AS A PUBLIC UTILITY AND GUARANTEED A FAIR RETURN UPON THE FAIR VALUE OF ITS INVESTMENT IN ACCORDANCE WITH TRADITIONAL PUBLIC UTILITY CONCEPTS OF FAIR RETURN AND FAIR VALUE OF INVESTMENT

That the Act did not intend the rents of the rental housing industry to be regulated by the Administrator as would the rates of a public utility is clearly indicated by Section 4 (d), which provides that "Nothing in this Act shall be construed to require any person . . . to offer any accommodations for rent," and thereby makes it plain that the Act is not to be construed as taking the property of the rental housing industry so as to require just compensation.[10] *Bowles* v. *Willingham*, 321 U. S. 503; *Taylor* v. *Bowles*, 145 F. 2d 833 (Em. Ct. App.).

[10] Public utilities were expressly exempted from price control by Section 302 (c) of the Act. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144.

Section 2 (b) of the Act (*infra* pp. 25–26) merely requires that maximum rents established by the Administrator for defense-area housing accommodations within a particular defense-rental area shall be generally fair and equitable and shall effectuate the purposes stated in Section 1 (a) of the Act. Section 2 (b) sets forth the standards which are to guide the Administrator in establishing such maximum rents. Thus, the Administrator is required to ascertain and give due consideration to the rents prevailing for housing accommodations in the area on or about April 1, 1941, or on or about the most recent date (not earlier than April 1, 1940) by which defense activities did not yet result, or threaten to result, in increases in rents for housing accommodations in the area inconsistent with the purposes of the Act. The Administrator is further required to make adjustments for such relevant factors as he determines and deems to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within the defense-rental area.

The very fact that the Act requires the Administrator to fix maximum rents with reference to rents prevailing as of a particular date demonstrates that the Congress did not intend the Administrator to institute an investigation as to whether the rents prevailing on that date allowed

landlords generally the traditional public utility fair return on the fair value of their investment. Yet it is of course possible that the rents prevailing on the maximum rent date did not allow landlords such a return. Nor does Section 2 (b) specify or indicate that whether landlords are earning a fair return on the fair value of their investment is a relevant factor of general applicability with respect to housing accommodations for which the Administrator shall make adjustments.

Congress in Section 2 (b) merely delegated authority to the Administrator to do what it itself did in the District of Columbia Emergency Rent Act which was under consideration at the same time as the Emergency Price Control Act and was passed December 2, 1941.[11] In that Act the Congress itself established the rents generally prevailing on January 1, 1941, as the maximum rents for the District of Columbia.[12] The Congress made no investigation as to whether the rents on that date allowed landlords in the District of Columbia a fair return on their investment, nor did it direct the Rent Administrator for the District of Columbia to make such an investigation in making rent adjustments.[13]

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[11] 55 Stat. 788, as amended by P. L. 242, 79th Cong., 1st Sess., and P. L. 472, 79th Cong., 2d Sess.

[12] *Id.*, Section 2.

[13] *Id.*, Section 3, which provides that: "Whenever in the judgment of the Administrator a general increase or de-

B. IT HAS BEEN THE CONSISTENT ADMINISTRATIVE PRACTICE TO TEST THE GENERAL FAIRNESS AND EQUITY OF A RENT REGULATION BY COMPARING THE CURRENT FINANCIAL POSITION OF LANDLORDS GENERALLY WITH THEIR POSITION DURING A REPRESENTATIVE PEACE-TIME PERIOD

Since the passage of the Act in January 1942, every Rent Regulation for Housing issued by the Administrator has used the maximum rent date technique of establishing maximum rents. The Administrator, however, has recognized, as did the Congress in requiring him to make adjustments, that increased operating costs incurred by landlords generally since the maximum rent date might reduce the income of landlords generally to the point where the Regulation ceased to be generally fair and equitable. To achieve the purposes of the Act, the Administrator has, since the passage of the Act, taken the position that he would increase maximum rents generally in an area if the current financial position of the landlords under the existing maximum rents was unfavorable as compared with their position during a representative peace-time period, when the area was as yet unaffected by defense and war

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crease since January 1, 1941, in taxes or other maintenance or operating costs or expenses has occurred or is about to occur in such manner and amount as substantially to affect the maintenance and operation of housing accommodations generally * * *, he may by regulation or order increase or decrease the maximum-rent ceiling * * * for such accommodations * * * in such manner or amount as will in his judgment compensate, in whole or in part, for such general increase or decrease".

activities.[14] In the New York City Defense-Rental Area the year 1939 has been determined by the Emergency Court of Appeals to be such a period. That determination is not sought to be reviewed by petitioners in this proceeding.[15] As pointed out in the Statement, *supra*, landlords generally in the New York City Defense-Rental Area are currently earning a net income more than twice that which they earned during 1939.

C. THIS STANDARD OF GENERAL FAIRNESS AND EQUITY HAS BEEN EXPRESSLY RATIFIED AND APPROVED BY THE CONGRESS

The legislative history preceding the passage of the Act clearly shows that the Congress was of the opinion that the income which an industry earned during a representative peace-time period, which was determined by the operation of our

[14] The Administrator adopted the same position under Section 2 (a) of the Act with regard to the price control program.

[15] Although petitioners allege (Pet. 8–9) that the year 1939 "was itself a year of depressed net income in the rental housing industry in New York City, a year in which that industry was unable to earn an adequate return on its investment", they have not shown that the year 1939 was not normal, nor does the petition raise that issue. The court below specifically found that the year 1939 was the "last normal pre-war year in New York City" (R. 963). During that year landlords in general were earning net income and therefore were receiving a return on their investment. Petitioners, in effect, therefore are arguing that either the Act or the Constitution requires that rent control in time of war must permit them to earn a greater return on their investment than that which they earned during a normal pre-war period.

competitive system, was sufficient to sustain it; and that the standards of the Act required no more than that the regulations of the Administrator should not prevent the industry from earning at least that return during the emergency.[16]

Prior to each extension of the Act the Administrator was called upon by the Congress to show that he complied with this base period industry earnings standard of "generally fair and equitable" and to defend its continued use against proposals to amend the Act to provide a different standard. During the course of these proceedings, and particularly in 1944 and 1945, the Administrator carefully elaborated the standards he was using to the Congress and to the public in general.[17]

[16] *I Hearings Before the House Committee on Banking and Currency*, 77th Cong., 1st Sess., on H. R. 5479 (superseded by H. R. 5990), pp. 11, 396, 441, 455, 462–463, 579, 580, 616–618, 830, 968, especially at pages 396 and 463.

[17] The references to the legislative history on this point are voluminous. See, for example, the statement of the Deputy Administrator of the Rent Department of the Office of Price Administration at pages 114–115 of *I Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376; the substantially identical statements made with respect to prices in the testimony of the Deputy Administrator for Price in the same Hearings at pages 55–57; the memorandum of the Office of Price Administration restating the test employed under the standard in Section 2 (a), set forth at pages 1404–1414, especially pages 1404–1408, of the *Hearings Before the Senate Committee on Banking and Currency*, 78th Cong., 2d Sess., on S. 1764; and the Charts concerning comparative earnings position of the various industries in the Appendix to volume I of the House Hearings

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Congress specifically approved the base period earnings standard as the test to determine whether the Regulations of the Administrator were generally fair and equitable [18] and renewed the Act each time without changing this standard.[19]

In fact, in 1944, the then chairman of the Metropolitan Fair Rent Committee, which is sponsoring the present petition, argued the alleged plight of landlords generally in the New York City Defense-Rental Area to the House Committee on Banking and Currency in much the same terms as does the present petition and offered an amendment to Section 2 (b) of the Act which would have specifically required that rent regulations permit the Rental Housing Industry to earn a fair return on its investment.[20] This proposal was not accepted.

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on H. R. 4376 at pp. 1177–1297, particularly pp. 1232, 1235, 1241, 1262–1264, 1283, 1275–1288; and *I Hearings Before House Committee on Banking and Currency*, 79th Cong., 1st Sess., on H. J. Res. 101, p. 88; *Hearings Before the Senate Committee on Banking and Currency*, 79th Cong., 1st Sess., on H. J. Res. 101, p. 101.

[18] H. Rep. No. 764, on H. Res. 101 (79th Cong., 1st Sess.), p. 10; S. Rep. No. 922, on S. 1764 (78th Cong., 2d Sess.), pp. 45–47, 51–53.

[19] This Court has held that the failure of Congress to change a statute when alleged faults in the statute are brought to its attention at committee hearings is of special significance in the construction of the statute. *Corn Exchange Nat. Bank & Trust Co.* v. *Klauder*, 318 U. S. 434.

[20] II *Hearings Before the House Committee on Banking and Currency*, 78th Cong., 2d Sess., on H. R. 4376, pp. 1608–

D. IN PASSING UPON THE VALIDITY OF THE ADMINISTRATOR'S REGULATIONS, THE EMERGENCY COURT OF APPEALS HAS CONSISTENTLY UPHELD THE PROPRIETY OF USING THE BASE-PERIOD INDUSTRY EARNINGS STANDARD.

In *Gillespie-Rogers-Pyatt Co., Inc.* v. *Boules*, 144 F. 2d 361, the Emergency Court of Appeals, after referring to the Committee Report cited *supra*, note 18, and the memorandum of the Office of Price Administration, cited *supra*, note 17, stated (at p. 366):

> * * * We think that Congress fully understood and approved the use by the Administrator of the industry earnings and product pricing standards when it extended the Emergency Price Control Act by the enactment of the Stabilization Extension Act of 1944. The use by the Administrator of these standards in the consideration of applications for price increases and the reasons for their use were clearly and forcefully disclosed to both Houses of Congress in connection with the consideration of that act. Not only was the memorandum from which we have quoted before the Committees on Banking and Currency of both Houses but the subject was discussed at the hearings held by the Committees, in the report of the Senate Committee and in

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1629. The text of the proposed amendment was as follows (at p. 1622):

"[and the Price Administrator] shall ascertain and give due consideration to charges for depreciation, deferred maintenance expense and mortgage charges to the end that *owners, generally*, of defense-area housing accommodations shall receive a *fair net return on their investments*." [Italics supplied.]

> the debates. Congress nevertheless continued without any modification the statutory standard—"generally fair and equitable"—which had been thus interpreted by the Administrator.

See, e. g., the following decisions of the Emergency Court of Appeals: *Interwoven Stocking Co.* v. *Bowles,* 141 F. 2d 696; *Birtcherd Dairy, Inc.* v. *Bowles,* 156 F. 2d 1004; *Allied Foods* v. *Bowles,* 151 F. 2d 449; *Chatlos* v. *Brown,* 136 F. 2d 490; *Spaeth* v. *Brown,* 137 F. 2d 669; *Madison Park Corporation* v. *Bowles,* 140 F. 2d 316; *Avant et al.* v. *Bowles,* 139 F. 2d 702; *Equitable Trust Company et al.* v. *Bowles,* 143 F. 2d 735. See also *Wilson* v. *Brown,* 137 F. 2d 348.

It is submitted, in conclusion, that in view of the foregoing, there can be no question whatsoever at this stage of the rent control program that, as a matter of statutory construction, the Act does not require that maximum rents, to be generally fair and equitable, must assure the rental housing industry a fair return upon the fair value of its investment, in accordance with the traditional public utility concept of fair return and fair value. The petition therefore raises no question of statutory construction that warrants review by this Court.

II. THE PETITION DOES NOT PROPERLY RAISE ANY QUESTION CONCERNING THE CONSTITUTIONALITY OF THE ACT AS THUS CONSTRUED BY THE ADMINISTRATOR AND THE COURT BELOW

As has been indicated in the Statement, *supra,* the court below did not pass upon the constitu-

tional question now sought to be raised by petitioners because petitioners never raised this question below. For this reason alone certiorari should be denied. *Sonzinsky* v. *United States,* 300 U. S. 506.

The petition should be denied on the additional ground that the record is barren of any evidence bearing upon the rate of return on investment which the individual petitioners are earning. Petitioners, therefore, have not shown that they come within the class of persons whose rights under the Fifth Amendment are alleged to have been violated. See *Aetna Insurance Company* v. *Hyde,* 275 U. S. 440; *Public Service Commission of Montana* v. *Great Northern Utilities Co.,* 289 U. S. 130. Furthermore, with regard to the evidence as to the rate of return on investment which landlords generally are earning, the court below, in passing upon the proper construction of Section 2 (b), stated (R. 1045):

> In our original opinion we pointed out that there was no satisfactory evidence in the record as to the amount of the industry's investment. Additional evidence, which while not wholly satisfactory, tends to show original cost and present value of a representative group of properties, has now been received.

However, as this Court stated in *Public Service Commission of Montana* v. *Great Northern Public Utilities Co., supra* (p. 137):

> * * * in order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of law.

Petitioners in this case fall far short of meeting that test.

For example, in spite of the implications to the contrary sought to be conveyed by petitioners in their reference to returns after fixed charges at pages 6 and 7 of their petition, the figures in the record purporting to show the investment, on various bases of valuation, of the landlords, generally, represent neither the total of the original costs of the properties surveyed, the actual 1944 value of the investment, the appraised values, nor the sales price of those properties. Instead, those figures were derived by petitioners by applying various formulae to data which they obtained from a sampling of a group of properties whose maximum rents averaged $100 or over (R. 524–547, 1027–1037; R. 814–828).

This sample, combining properties surveyed by the OPA and properties surveyed by petitioners, was unrepresentative since at least 40 of the 56 properties surveyed by petitioners were being held and operated by banks and insurance companies (R. 744, 787, 816, 819).[21] In calculat-

[21] Of the 56 properties in this group surveyed by petitioners (R. 793–801), only six showed interest charges, the remain-

ing return after fixed charges for both the $100 and over group and landlords generally petitioners assumed (Pet. 6–7) that all the properties in the $100 and over group, and in industry generally, are mortgaged, whereas (1) the data presented by petitioners for the $100 and over group shows conclusively that the overwhelming majority of properties in that group was not mortgaged, and (2) virtually one-half of the rental units included within the industry survey [22] were also not mortgaged.[23] This clearly demonstrates that petitioners' assumption as to the interest charges of the $100 and over group and of landlords gen-

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ing 50 being unmortgaged. Cf. the Exhibit at R. 509 which reports interest charges for at least one-half of the 50,129 units in the properties in the June 1945 survey (R. 747, 977–998).

[22] The "industry survey" referred to is the OPA survey of June 20, 1945, appearing at pages 747, 977–998 of the Record

[23] For the convenience of petitioners, the Accounting Department of the Office of Price Administration introduced a breakdown of all properties included in the industry survey of June 20, 1945, listing in a separate Exhibit all the properties which showed charges for both depreciation and interest (R. 509). Only one-half the total number of units in the industry survey were mortgaged (Cf. R. 747 with R. 509). Petitioners computed the percentage which depreciation and interest for only the mortgaged properties bore to the assessed valuation of those properties (R. 536–537). In estimating returns, however, after fixed charges for both the $100 and over group and the industry, petitioners used the percentage figure derived from consideration of mortgaged properties only (R. 517, 537, 540, 541, 821), despite the fact that only one-half of the properties in the groups for which it was estimating returns were mortgaged properties.

erally are wholly unwarranted and the returns after fixed charges which petitioners show are meaningless. Petitioners themselves recognize at least this deficiency in their data with respect to returns after fixed charges and make certain assumptions, in the absence of any data in the record, as to the value of the owners' equities in the properties which, too, are wholly unwarranted.[24] It is interesting to note that even on the basis of their own assumptions as to investment value, depreciation and interest, and value of the owners' equities, petitioners calculate that the industry generally earned a return of 3.15% after fixed charges on the estimated 1944 investment value (Pet. 7). However, in their brief in the court below petitioners conceded that "returns on real estate are customarily measured by the returns after operating expenses but before depreciation and interest in order to avoid the question of whether or not the properties are mortgaged" (Pet. Br. in court below, pages 16, 55). Computing returns on this basis and accepting petitioners' assumptions as to the value of investment for that purpose, petitioners showed that landlords generally during 1944 were earning a return of from 5.35% to 7.5% depending upon which of the bases of valuation suggested by peti-

[24] For example, at page 7 of their petition, petitioners multiply the figures for returns after fixed charges by a factor of 3, in an attempt to overcome the defects in their assumptions as to fixed charges (See Note 23, *supra*).

tioners is adopted (R. 536–537, 820; Pet. Br. in court below, pp. 16, 55). Petitioners contended below that a fair return before depreciation and interest would be between 7% and 8% (Pet. Br. in court below, pp. 30, 56).

Although respondent submits that the figures set forth in the petition (Pet. 7) purporting to show a negative return for landlords owning properties whose maximum rents are $100 or more, do not, as we have explained above, show the actual financial condition of such landlords in general, respondent has not developed this point further because petitioners do not claim that either the Act or the Fifth Amendment requires that this group must be permitted, as a group separate and apart from landlords generally, to earn a fair return on investment.

CONCLUSION

The decision below is correct and there is no warrant for review of the questions presented by the petition. The petition should therefore be denied.

Respectfully submitted.

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DECEMBER 1946.

APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by the Stabilization Extension Act of 1944, 58 Stat. 632,[1] are as follows:

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may

[1] Roman type is used to indicate text which has not been changed since original enactment or issuance and italics are used to indicate amendments.

determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: * * *.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing ac-

commodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs *within such defense-rental area.*[2] In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. *Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for*

[2] Added by sec. 102 of the Stabilization Extension Act of 1944.

comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs.[3] Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

SEC. 4. (d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in

[3] Added by sec. 102 of the Stabilization Extension Act of 1944.

[4] As amended by sec. 106 of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[5] As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was

support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,* the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

SEC. 302. As used in this Act—* * *

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in

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stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

* As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided,* That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

II. Rent Regulation for Housing for New York City Defense-Rental Area (8 F. R. 13914) as amended:

SEC. 4. *Maximum rents.*—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented on March 1, 1943.*—For housing accommodations rented on March 1, 1943, the rent for such accommodations on March 1, 1943.

(b) *Not rented on March 1, 1943 but rented during January or February, 1943.* For housing accommodations not rented on March 1, 1943, but rented at any time during January or February, 1943, the last rent for such accommodations during the two-month period.

(c) *First rent after March 1, 1943 but before November 1, 1943.*—For housing ac-

commodations not rented on March 1, 1943 nor during January or February, 1943, but rented prior to November 1, 1943, the first rent for such accommodations after March 1, 1943. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

(d) *Constructed or changed before November 1, 1943.*—For (1) newly constructed housing accommodations without priority rating first rented after March 1, 1943 and before November 1, 1943, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change: *Provided, however,* That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

(e) *First rent after November 1, 1943.* For (1) newly constructed housing accommodations without priority rating first rented on or after November 1, 1943, or (2) housing accommodations changed on or after November 1, 1943 so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations

not rented at any time between December 31, 1942 and November 1, 1943, or (4) housing accommodations changed on or after November 1, 1943 from unfurnished to fully furnished, the first rent for such accommodations after the change or on or after November 1, 1943, as the case may be. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

SEC. 5. *Adjustments and other determinations.*—In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

(a) *Grounds for increase of maximum rent.*—Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable, only on the grounds that:

(1) *Major capital improvement after November 1, 1943.*—There has been on or after November 1, 1943 a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance.

(2) *Change prior to March 1, 1943.*—There was, on or prior to March 1, 1943, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance or a substantial increase in the services, furniture, furnishings or equipment, and the rent on March 1, 1943 was fixed by a lease or other rental agreement which was in force at the time of such change or increase.

(3) *Substantial increase in services, furniture, furnishings or equipment.*—There has been a substantial increase in the services, furniture, furnishings or equipment provided with the housing accommodations since the date or order determining its maximum rent. No increase in the maximum rent shall be ordered on the ground set forth in this paragraph (a) (3) unless the increase in services, furniture, furnishings or equipment occurred with the consent of the tenant or while the accommodations were vacant: *Provided*, That an adjustment may be ordered, although the tenant refuses to consent to the increase in services, furniture, furnishings or equipment, if the Administrator finds that such increase (i) is reasonably required for the operation of a multiple dwelling structure or other structure of which the accommodations are a part or (ii) is necessary for the preservation or maintenance of the accommodations.

(4) *Special relationship between landlord and tenant.*—The rent on the date determining the maximum rent was materially affected by the blood, personal or other special relationship between the landlord and the tenant and as a result was substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943: *Provided*, That no adjustment under this subparagraph increasing the maximum rent shall be made effective with respect to any accommodations regularly rented to employees of the landlord while the accommodations are rented to an employee, and no petition for such an adjustment will be entertained

until the accommodations have been or are about to be rented to one other than an employee.

(5) *Lease for term commencing one year or more before March 1, 1943.*—There was in force on March 1, 1943, a written lease, for a term commencing on or prior to March 1, 1942, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943; or the housing accommodations were not rented on March 1, 1943, but were rented during January or February, 1943 and the last rent for such accommodations during that two-month period was fixed by a written lease, for a term commencing on or prior to March 1, 1942, requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943.

(6) *Varying rents.*—The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a substantially higher rent at other periods during the term of such lease or agreement.

(7) *Seasonal rents.*—The rent on the date determining the maximum rent was substantially lower than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(8) *Substantial increase in occupancy.*—There has been, since March 1, 1943, either

(i) a substantial increase in the number of subtenants or other persons occupying the accommodations or a part thereof under a rental agreement with the tenant, or (ii) a substantial increase in the number of occupants, in excess of normal occupancy for that class of accommodations on March 1, 1943, or (iii) an increase in the number of occupants over the number contemplated by the rental agreement on the date determining the maximum rent, where the landlord on that date had a regular and definite practice of fixing different rents for the accommodations for different numbers of occupants.

(9) *Temporarily exempt from real estate taxes.*—On the date determining the maximum rent the housing accommodations were temporarily exempt from real estate taxes, the landlord was passing the benefit of this tax exemption on to the tenant, and as a result the rent on that date was substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on March 1, 1943.

(10) *Priority rating granted on September 1941 application form of Office of Production Management.*—The maximum rent for the housing accommodations is established under section 4 (f), the application for priority rating for the construction of the housing accommodations was filed on the September 1941 form in use by the Office of Production Management prior to the revision of this form on December 15, 1941, the landlord did not make, prior to March 1, 1943, or, if the accommodations were not rented on that date, prior to the first renting of the accommodations after

that date, a written request to the appropriate agency of the United States to approve a higher rent than the rent initially approved because of increased costs of construction, and the maximum rent for the accommodations is substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable accommodations on March 1, 1943, giving due consideration to general increases in costs of construction, if any, in the Defense-Rental Area since March 1, 1943.

This paragraph (a) (10) shall apply only to housing accommodations which were first rented prior to March 29, 1944.

(11) *Peculiar circumstances.*—The rent on the date determining the maximum rent was materially affected by peculiar circumstances and as a result was substantially lower than the rent generally prevailing in the defense-rental area for comparable housing accommodations on March 1, 1943.

(12) *Substantial hardship from increase in property taxes or operating costs.*—Substantial hardship has resulted from a substantial decrease in the net income (before interest) of the property for the current year as compared with a representative period prior to March 1, 1943, due to a substantial and unavoidable increase in property taxes or operating costs.

For the purposes of this paragraph (a) (12) the term:

(i) "Net income (before interest)" means the amount determined by subtracting unavoidable property taxes and operating costs actually paid or accrued from total income earned.

(ii) "Property taxes and operating costs" includes all expenses necessary to

the operation and maintenance of the property actually paid or accrued and properly allocated, including depreciation but excluding interest.

(iii) "Property" includes one or more structures operated as a single unit or enterprise.

(iv) "Total income earned" includes rental and other income earned from the property and the rental value of housing accommodations in the property occupied without the full payment of rent.

(v) "Current year" means a period of twelve calendar months beginning on or after the effective date of regulation. The most recent calendar or fiscal year used by the landlord or the twelve calendar months immediately prior to the filing of the petition for adjustment may be used.

This section 5 (a) (12) shall not apply to maximum rents established under section 4 (f) where the accommodations are first rented after March 1, 1943 or to maximum rents established under section 4 (c), (d) or (e).

(13) *Rented to an employee of landlord.*—The housing accommodations were rented to an employee of the landlord both on the date determining the maximum rent and at the time the order under this paragraph (a) (13) is issued, and after the date determining the maximum rent but prior to the effective date of regulation the landlord and tenant agreed, as the result of a continuous process of bargaining on interrelated matters, upon a wage increase and a rent increase, and the wage increase agreed upon has been put into effect.

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